

The complaint

Mrs P complains that HSBC UK Bank Plc trading as first direct ('first direct') won't reimburse the money she lost when she fell victim to a scam.

What happened

Mrs P had invested through a company I'll refer to as B in 2017. She received the returns and final exit payment she expected on 26 June 2020. Mrs P decided to invest again and on 29 June 2023 paid B £14,000. She understood that a car would be bought on her behalf and leased out by a connected company (R). She would receive monthly returns, a final gross payment at the end of the term and security over the car.

Between 27 July 2020 and 25 January 2021 Mrs P received seven payments of £267.36 from B totalling £1,871.52. No further payments were received after this date.

In June 2023 Mrs P complained to first direct through a professional representative. She said first direct failed to protect her at the time she made the payment to B, and she should be reimbursed under the Lending Standards Board's Contingent Reimbursement Model Code (CRM Code).

First direct didn't agree to reimburse Mrs P's loss. It said that at the time Mrs P made the payment B was trading and later went into administration. As a result, first direct said Mrs P had a civil dispute with B.

Mrs P was unhappy with first direct's response and brought a complaint to this service.

Our investigation so far

The investigator who considered this complaint recommended that it be upheld. She said that the CRM Code required first direct to provide an outcome within 15 days of the completion of the Serious Fraud Office Investigation on 19 January 2024 but had not done so. And the Lending Standards Board has confirmed that the CRM Code does not require a criminal test to have been met before a reimbursement decision can be made.

The investigator went on to explain why she felt Mrs P's complaint was covered by the CRM Code - and recommended that first direct reimburse her in full. On top of this, the investigator said that first direct should add interest at the rate of 8% simple per year from 15 days after 19 January 2024 to the date of settlement. Finally, the investigator said it would be fair for first direct to ask Mrs P to sign an indemnity confirming she will return any funds that may later be recovered in the administration process.

Mrs P accepted the investigator's recommendations. First direct maintained that there is insufficient evidence to conclude that the CRM Code applies to this complaint, and it is premature to reach a conclusion that she should be refunded under the code. The response from first direct was lengthy and this service has already provided a detailed response, so I'll only set out some key points here:

- It is incorrect to assume that all investors would receive security for their payments. Information provided by the administrators about different categories of investments has been overlooked. If some investors didn't receive security for their investments, it might mean that the amount of available vehicles and the lack of charges over some shouldn't be problematic in the way this service has suggested.

- The opinion over relies on the charges brought by the Serious Fraud Office (SFO) and conflates that development with the different CRM Code test for what is an APP scam.
- The opinion reaches unsafe conclusions on the application of the CRM Code. For the CRM Code to apply, Mrs P must demonstrate that she transferred funds to another person for what she believed was for legitimate purposes but which were **in fact** first direct's emphasis) fraudulent. This requirement excludes misrepresentation. Other possibilities, such as B failing to honour all its promises, or trading while insolvent haven't been considered.
- It is premature for an opinion to be reached as there is insufficient evidence to reach reliable conclusions.

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.

In deciding what's 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 time.

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. But there are circumstances when it might be fair and reasonable for a firm to reimburse a customer even when they have authorised a payment.

Under the CRM Code, the starting principle is that a firm should reimburse a customer who is the victim of an authorised push payment (APP) scam, except in limited circumstances. But the CRM Code only applies if the definition of an APP scam, as set out in it, is met. I will discuss this later in my decision.

Is the CRM Code definition of an APP scam met?

I have considered whether Mrs P's claim falls within the scope of the CRM Code, which defines an APP scam as:

...a transfer of funds executed across Faster Payments...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) *(ii) The Customer transferred funds to another person for what they believed were legitimate purposes but which were in fact fraudulent.*

To decide whether Mrs P is the victim of an APP scam as defined in the CRM Code I have considered:

- The purpose of the payments and whether Mrs P thought this purpose was legitimate.
- The purpose the recipient (B) had in mind at the time of the payment, and whether this broadly aligned with what Mrs P understood to have been the purpose of the payment.
- Whether there was a significant difference in these purposes, and if so, whether it could be said this was as a result of dishonest deception.

From the evidence I have seen I'm satisfied Mrs P intended to invest in B. She understood that B would use the funds she paid to buy a car that would be leased, and she would receive returns on her investment. I haven't seen anything to suggest that Mrs P didn't consider this to be a legitimate purpose.

I've gone on to consider the purpose B had in mind at the time it took the payment. After careful consideration, I'm not satisfied B intended to act in line with the purpose agreed with Mrs P and will explain why.

In its first supervisory notice in respect of R in February 2021 the FCA noted that R said it had entered into approximately 1,200 leases in the period January 2018 to January 2021, but only 69 charges had been registered.

In the same notice the FCA said it had conducted a sampling of R's leaseholder list against the DVLA database and identified various discrepancies between its business model and vehicle inventory. The FCA report referred to the fact that 55 cars appeared to be second hand (although its business model relied to a large extent on securing heavy discounts on new vehicles), to vehicles that couldn't be found, and to leases entered into at a date significantly before the vehicle was put on the road. The FCA also concluded that the group's liabilities significantly exceeded its assets, and its business model was fundamentally unsustainable.

I have also seen evidence from an SFO news release dated 19 January 2024 which confirms that two directors of B had been charged in relation to the car lease scheme. The news release noted that directors were accused of providing those who signed up with false information, encouraging people to pay in with false information whilst knowing that investments weren't backed up by the cars they had been promised.

The SFO also noted that the investment was backed by a tangible asset – a car. Mrs P has been unable to provide the "Vehicle Funding Form" she was provided with when she made the payment. She has provided her welcome letter though, that said "your capital is used to fund a specific vehicle". The evidence I have referred to above shows this aspect of the investment wasn't being performed.

A report by the administrators of one of the connected companies said that the total number of loan agreements relating to 834 investors was 3,609. But the number of vehicles held by the company at the time it went into administration was 596, equating to less than one car for every six loan agreements.

Overall, I'm satisfied B didn't provide the investment it offered to Mrs P and didn't follow its business model. The purpose B intended when it took Mrs P's funds wasn't aligned with hers. Given the information provided by the SFO in respect of what the directors of B are accused of, I'm persuaded that the purposes each party had in mind for the payments weren't aligned as a result of dishonest deception. This means that I'm satisfied the CRM Code definition of an APP scam has been met.

Should Mrs P be reimbursed under the CRM Code?

First direct is a signatory to the CRM Code which requires firms to reimburse victims of APP scams like this one unless it can establish that it can rely on one of the listed exceptions set out in it. Under the CRM Code, a bank may choose not to reimburse a customer if it can establish that:

- 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.
- The customer ignored an effective warning by failing to take appropriate steps in response to that warning.

There are further exceptions outlined in the CRM Code that do not apply to this case.

It is for first direct to establish that an exception to reimbursement applies. Here, first direct hasn't considered Mrs P's complaint under the CRM Code and didn't respond to any points

made by the investigator in respect of its application. So, it hasn't demonstrated that any of the listed exceptions can fairly be applied.

For the sake of completeness, I'll briefly cover why I'm not persuaded any of the listed exceptions can be fairly applied. Mrs P has provided evidence that she invested with B previously. Her bank statements, which first direct provided to this service, show receipts from B and a final exit payment towards the end of June 2020. Given that Mrs P had a positive experience with this investment, I think she had every reason to believe she was investing through a legitimate company.

First direct hasn't provided any warnings so hasn't demonstrated that Mrs P ignored an effective warning.

I've also thought about whether first direct ought reasonably to have intervened and asked Mrs P probing questions about the nature of the payment and provided scam advice. I don't consider the scam would have been uncovered and her loss prevented if it had. I say this because I don't think there was enough information available at the time that would have led first direct to be concerned that Mrs P was at risk of financial harm.

Mrs P has advised that she received returns which total £1,871.52. These returns should be deducted from the amount first direct should reimburse Mrs P.

Interest

I'm not persuaded first direct acted unreasonably in not upholding Mrs P's claim when it was first reported in June 2023. At the conclusion of the SFO investigation though I consider first direct should have assessed all the available evidence and made a decision within 15 business days of 19 January 2024. So first direct should pay interest at the rate of 8% simple from 15 business days after the SFO published its outcome on 19 January 2024.

It is open to first direct to ask Mrs P to sign an indemnity confirming that she will return any funds recovered through the administrators of B (and associated companies) if it wishes to do so. This is a separate matter between Mrs P and first direct.

The points first direct has raised

First direct has raised a number of points in response to the view. I'm aware that our service has previously responded to the points they've raised in detail.

I'd like to reassure first direct that I have considered all the points it has raised. But I've focused my decision on what I consider to be the crux of the complaint and how I've reached my decision.

The investigator has provided first direct with a copy of the welcome letter which confirmed that Mrs P would receive security. And the lack of security registration isn't the sole reason I'm satisfied this is an APP scam but is one of the factors that I've taken into account.

I don't agree that in reaching her view, the investigator has over relied on the charges brought by the SFO and conflated that development with the different CRM Code test for what is an APP scam. I have considered a combination of factors, including the charges, to reach a decision that on the balance of probabilities the definition of an APP scam set out in the CRM Code has been met.

Based on all the evidence that I've seen, I'm satisfied that I can reach a decision that it's more likely than not Mrs P's payment is covered by the CRM Code for the reasons explained above. I'm not persuaded I need to wait for any further updates from external parties or organisations to reach my decision.

Claims made to the FSCS

The Financial Services Compensation Scheme (FSCS) is accepting customer claims submitted to it against Raedex Consortium Ltd. More information about FSCS's position on claims submitted to FSCS against Raedex can be found here: <https://www.fscs.org.uk/making-a-claim/failed-firms/raedex/>

The FSCS is also aware that we have issued recent decisions upholding complaints against banks related to the Raedex investment scheme. Whether the FSCS pays any compensation to anyone who submits a claim to it is a matter for FSCS to determine, and under their rules. It might be that Raedex Consortium Ltd has conducted activities that have contributed to the same loss Mrs P is now complaining to us about in connection with the activities of first direct.

As I have determined that this complaint should be upheld Mrs P should know that as she will be recovering compensation from first direct, she cannot claim again for the same loss by making a claim at FSCS (however, if the overall loss is greater than the amount she recovers from first direct she may be able to recover that further compensation by making a claim to FSCS, but that will be a matter for the FSCS to consider and under their rules.) Further, if Mrs P has already made a claim at FSCS in connection with B, and in the event the FSCS pays compensation, Mrs P is required to repay any further compensation she receives from her complaint against first direct, up to the amount received in compensation from FSCS.

FOS and FSCS operate independently, however in these circumstances, it is important that FSCS and FOS are working together and sharing information to ensure that fair compensation is awarded. More information about how FOS shares information with other public bodies can be found in our privacy notice here: <https://www.financial-ombudsman.org.uk/privacy-policy/consumer-privacy-notice>

Overall, I'm not satisfied first direct treated Mrs P fairly. It should put things right by making the payments set out below.

My final decision

I uphold this complaint and require HSBC UK Bank Plc trading as first direct to:

- Reimburse Mrs P's full outstanding loss after deducting the payments she received (£12,128.48); and
- Pay interest on the above amount at the rate of 8% simple per year from 15 business days after 19 January 2024 to the date of settlement, less tax if legally deductible.
- In order to avoid the risk of double recovery first direct 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 HSBC UK Bank Plc trading as first direct considers that it is required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs P how much it's taken off. It should also give Mrs P a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 12 February 2025.

Jay Hadfield
Ombudsman