DRN-5193802

The complaint

Mr and Ms M complain that Marks & Spencer Financial Services Plc (trading as M&S Bank) won't refund the money they lost when they fell victim to a scam.

What happened

Mr and Ms M came across an opportunity to invest in a company which leased cars – Buy2Let/Raedex Consortium Ltd - I'll call these companies B and R. They were told their investment would be used to buy vehicles which would then be leased out, but that they would be granted security over the vehicles. Mr and Ms M were told they'd receive regular returns on their investment, and then an exit payment (the remainder of the invested capital plus interest) when the vehicles were returned by the lessee. Mr and Ms M made two faster payments to B, in August 2020, to fund the investment, these payments totalled £154,000.

They also made another payment to B, via cheque, for a further investment, but that cheque payment is not being considered as part of this complaint.

Mr and Ms M received the expected monthly returns until January 2021, but the payments then stopped, and in March 2021 Mr and Ms M received an email telling them that B had gone into administration. Mr and Ms M subsequently contacted M&S to report the faster payments they had made as a scam and to ask it to refund the money they had lost.

M&S investigated but maintains that there is not enough evidence to say for sure that B was operating as a scam, it therefore declined to refund any of Mr and Ms M's loss.

One of our investigators looked at the complaint. They said the evidence showed there was a clear discrepancy between the payment purposes Mr and Ms M and B had in mind, so they felt this met the definition of a scam as per the Lending Standards Boards' Contingent Reimbursement Model Code (the Code). They also said they were satisfied Mr and Ms M had a reasonable basis for believing the investment was legitimate. So, they recommended M&S refund Mr and Ms M's losses from the faster payments in full, plus interest, taking account of the returns they received from those particular investments.

M&S disagreed, it does not consider we can reasonably conclude that Mr and Ms M were the victim of a scam based on the complexity of the circumstances here and given the currently available information. It has also expressed concerns that, in light of the administration process and the involvement of the FSCS, Mr and Mrs M could be over-reimbursed for their loss.

As no agreement could be reached this case has now been passed to me to determine.

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 broad terms, the starting position at 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.

M&S is a signatory of the Lending Standards Boards Contingent Reimbursement Model Code (the Code). This requires firms to reimburse customers who have been the victim of certain types of scams, in all but a limited number of circumstances. But customers are only covered by the Code where they have been the victim of a scam – as defined in the Code.

Is it appropriate to determine Mr and Ms M's complaint now?

The Serious Fraud Office (SFO) had been carrying out an investigation into the car leasing company and several connected companies. But that investigation concluded on 19 January 2024 when the SFO published the outcome of the investigation, which included the charging of R's former company directors with fraud, on its website.

There may be circumstances and cases where it's 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. And I'm conscious that any criminal proceedings that may ultimately take place have a higher standard of proof (beyond reasonable doubt) than I'm required to apply.

The LSB has said that the CRM Code doesn't 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 and Ms M's complaint I have to ask myself whether I can be satisfied, on the balance of probabilities, that the available evidence indicates that it's more likely than not that Mr and Ms M were the victim of a scam rather than a failed investment.

I'm also required to determine complaints quickly and with minimum formality. In view of this, I don't think it would be appropriate to wait to decide Mr and Ms M's complaint unless there is a reasonable basis to suggest that the outcome of the related court case may have a material impact on my decision over and above the evidence that is already available.

I'm aware that any subsequent court action regarding R's actions has the potential to lead to Mr and Ms M being compensated twice for the same loss, i.e. by M&S and by the courts. But I don't know how likely it is that any funds will be recovered as part of those proceedings.

Similarly, I'm aware that there is an ongoing administration process – including liquidation. This might result in some recoveries; but given this would initially be for secured creditors, I think it's unlikely that victims of this scheme (as unsecured creditors) would get anything substantive. That said, in order to avoid the risk of double recovery M&S is entitled to take, if it wishes, an assignment of the rights to all future distributions under the administrative process before paying the award.

I'm also aware that 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 Mr and Ms M are now complaining to us about in connection with the activities of M&S.

As I'm minded to uphold this complaint for the reasons given below, Mr and Ms M should know that as they will be recovering compensation from M&S, they cannot claim again for the same loss by making a claim at FSCS (however, if the overall loss is greater than the amount recovered from M&S, they 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 Mr and Ms M have already made a claim at FSCS in connection with this matter, and in the event the FSCS pays compensation, Mr and Ms M are required to repay any further compensation they receive from their complaint against M&S, up to the amount received in compensation from FSCS.

FOS and FSCS operate independently, however in these circumstances, it's 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.financialombudsman.org.uk/privacy-policy/consumer-privacy-notice

Whilst the FSCS may be taking on these cases against R as a failed unregulated investment, it doesn't automatically follow that this was not a scam. This is not something that the FSCS would make a finding on before considering those claims.

M&S has suggested that the FSCS route should be explored before relying on a voluntary reimbursement scheme. I should explain that we do sometimes dismiss complaints as better suited to another scheme where appropriate – for example, if the FSCS has agreed to take on claims. However, that is usually only in situations where the complaints brought to us are against the same business the FSCS has opened claims about. That isn't the case here. The complaints we are considering are against signatories of the CRM Code, for nonpayment of a claim, whereas the claims the FSCS have opened are against Raedex, an entirely different entity.

The FSCS is the fund of last resort, and so it should be the final place a person goes to for redress. Therefore, we would not necessarily expect customers to go to the FSCS before going to their bank. Furthermore, our service has an obligation to investigate complaints which are brought to us.

As M&S can ask Mr and Ms M to undertake to transfer to it any rights there may be to recovery elsewhere, I'm not persuaded that these are reasonable barriers to it reimbursing Mr and Ms M in line with the CRM Code's provisions.

So, in summary, the SFO has reached an outcome on its investigation, and I don't think it's fair or necessary to wait until the outcome of the related court case (which is scheduled to commence in almost two years). Nor do I consider it's necessary to wait for the administration process to complete or wait for a claim with FSCS to be made. So, I don't think it would be fair to wait for other investigations to complete before making a decision on whether to reimburse Mr and Ms M.

Have Mr and Ms M been the victim of a scam, as defined in the Code?

The Code defines an APP scam as a payment made "to another person for what they believed were legitimate purposes, but which were in fact fraudulent."

So, I need to consider whether the purpose Mr and Ms M intended for the payments they made was legitimate, whether the purposes they and B had in mind for the payments were broadly aligned and then, if they weren't, whether this was the result of dishonest deception on the part of B.

I'm satisfied Mr and Ms M made the payments that are the subject of this complaint with the intention of investing with B. They thought their funds would be used to buy vehicles which would then be leased out – by R, a company related to B and which was regulated by the Financial Conduct Authority (FCA) – and that they would receive regular returns on their investment. Nothing I've seen suggests to me that Mr and Ms M didn't think this arrangement was a legitimate investment.

But I think the evidence I've seen does suggest that B didn't intend to act in line with the purpose for the payments it had agreed with Mr and Ms M. Mr and Ms M were told the vehicles they funded would be secured in their favour, and from what we've seen of what B told investors this was presented as being by way of a charge registered at Companies House. But the FCA's supervisory notice to R – the connected company that would be leasing the vehicles - said that, while the various companies involved had around 1,200 customers and had entered around 1,200 leases, they had only registered 69 vehicles at Companies House – suggesting that the vast majority of the vehicles funded weren't secured in the way B's investor's were told they would be.

The FCA also checked a sample of the vehicles the companies held against the DVLA database, and found many more discrepancies:

- more of these vehicles were second-hand than the stated business model suggested or would support,
- a number of leases started significantly before the vehicles were put on the road, and
- some vehicles were not found on the database at all.

The FCA also said it considered the companies' valuation of the vehicles it held was unrealistic and that the group's liabilities significantly exceeded its assets.

A report by the administrators of R also said that the total number of known loan agreements was 3,609, relating to 834 investors, but that the number of vehicles held by the group at the appointment of the administrators was 596 – or less than one car for every six loan agreements.

In light of this, I think the evidence shows the company was not carrying out key aspects of its agreement with investors on a large scale. M&S has commented that there were apparently various categories of investors not all of whom were told they would receive security over a vehicle. But I'm satisfied Mr and Ms M *were* told their investment was secured, as set out in the paperwork we have sent to M&S. And there's also no evidence to show that any charge was specifically registered in Mr or Ms M's favour over any vehicle following their investment. So, a significant aspect of what they agreed with B does not appear to have been carried out.

The SFO has also made it clear that the former company directors are accused of providing those who invested with false information and encouraging people to invest whilst knowing that investments were not backed up by the cars they had been promised. I don't think the fact that the directors appear to refute this means that it should be discounted.

With all this in mind, I'm satisfied that it is more likely than not that the purpose that B intended for the payments Mr and Ms M made wasn't aligned with the purpose Mr and Ms M intended for those payments. And that the discrepancy in the alignment of the payment purposes between Mr and Ms M and B was the result of dishonest deception on the part of B. It follows that I consider the circumstances here do meet the definition of a scam as set out in the Code.

Are Mr and Ms M entitled to a refund under the Code?

The Code requires firms to reimburse customers who have been the victim of authorised push payment scams, like the one I'm satisfied Mr and Ms M fell victim to, in all but a limited number of circumstances. And it is for the firm to establish that one of those exceptions to reimbursement applies.

Under the Code, a firm may choose not to reimburse a customer if it can establish that the customer made the payment without 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

There are further exceptions within the Code, but these don't apply here.

And, from what I've seen, the information available at the time of Mr and Ms M's payments would not have indicated to them that B was acting illegitimately. R, which carried out the leasing activity on B's behalf, was an FCA regulated company. The company literature that appears to have been available at the time appeared professional, as did the documents Mr and Ms M received. B had also been operating, apparently successfully, for several years at the time Mr and Ms M invested in 2020. So, I don't think there was anything about their investment that should have caused Mr or Ms M significant concern. I therefore consider that Mr and Ms M did have a reasonable basis for believing the investment was legitimate.

With this in mind, I don't think M&S has established that any of the exceptions to reimbursement under the Code apply here, and so it should refund the money Mr and Ms M lost from the faster payments in full.

Redress

As Mr and Ms M received a number of monthly interest payments back from B relating to his specific investment, I think it would be fair for these payments to be deducted from the amount M&S has to refund to them.

I also don't think any reasonable action I would've expected M&S to take would have prevented Mr and Ms M making these payments, or enabled it to recover any of Mr and Ms M's funds once they told it of the scam. I say this as I don't think any of the information I would've reasonably expected it to have uncovered at the time of the payments would've brought the scam to light. I also don't think it was unreasonable for M&S to initially decline Mr and Ms M's claim, as it wasn't wholly clear from the evidence available at the time that this was a scam. M&S also could not have recovered Mr and Ms M's funds at the time the scam was reported given that B had already entered liquidation by that stage.

But I do think M&S should have responded to Mr and Ms M's claim and refunded their losses under the Code within 15 days of the SFO publishing the outcome of its investigation. And

so I think M&S should now pay 8% interest on the refund, from 15 days after the SFO published its outcome on 19 January 2024, until the date of settlement.

Putting things right

To resolve this complaint M&S should now:

- Refund to Mr and Ms M the faster payments they made as a result of this scam, less any returns they received from B and its related companies relating to those specific investments.

- Pay Mr and Ms M 8% interest on that refund, from 15 days after 19 January 2024 until the date of settlement

In order to avoid the risk of double recovery M&S is entitled to take, if it wishes, an assignment of the rights to all future distributions under the administrative process before paying the award.

My final decision

I uphold this complaint. Marks & Spencer Financial Services Plc (trading as M&S Bank) should now put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Ms M to accept or reject my decision before 13 February 2025.

Sophie Mitchell
Ombudsman