DRN-5286228

The complaint

A company, which I'll refer to as "D", complains that Bank of Scotland plc ("BoS") won't refund the money it lost to a scam.

Mr C, a director of D, brings the complaint on D's behalf. I'll refer to Mr C and D throughout my decision.

What happened

Having invested previously, D invested £98,000 in a company called Buy2let/Raedex Consortium Ltd – "R" in May 2019.

Mr C understood that the investment would fund new lease cars for a UK driver for three years. D's capital would be repaid in monthly instalments over the term with a final payment plus the interest being paid at the end of this. D received returns of £37,430.40.

Mr C said he realised there was a problem due to the publicity after the payments stopped in February 2021. He now believes D has been the victim of a scam. And he thinks that an appropriate intervention at the time would have stopped D from making the payments. In total, the loss is £60,569.60.

Mr C complained to BoS. But it didn't agree to refund D's losses. It said the payment wouldn't be classed as a scam – and instead appears to be a failed investment – and D isn't a microenterprise so wouldn't be covered by the Contingent Reimbursement Model (CRM) Code.

Our investigator considered the complaint. He said the evidence showed there was a clear discrepancy between the payment purposes D and R had in mind, so this met the CRM Code's definition of a scam. He felt Mr C had a reasonable basis for believing the investment was legitimate. So, he recommended BoS refund the losses plus 8% simple interest per annum from 15 days after the date the directors of R were charged by the SFO to the date of settlement.

Mr C agreed with this outcome, but BoS didn't. In summary, it felt that it would be premature to decide this complaint due to ongoing investigations.

The complaint has been passed to me to decide. I got in touch with both parties as BoS had said that D wasn't a microenterprise. Following information provided by Mr C and D, BoS has now agreed from this that D *was* a microenterprise. So the complaint can still be considered under the CRM Code.

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.

Having done so, I'm upholding this complaint – I'll explain why.

When considering 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 what I consider to have been good industry practice at the 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.

The CRM Code is of particular relevance in this case. This is a voluntary code that requires firms signed up to it, or committed to applying it, to reimburse customers who have been the victim of authorised push payment scams, in all but a limited number of circumstances. BoS was a signatory to the CRM Code at the time the payment in dispute was made.

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, meets the CRM Code's definition of a scam. It's defined in the Code as:

"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 were in fact fraudulent."*

If I conclude that the payment meets the definition of a scam, as defined above, then D would be entitled to reimbursement unless BoS has shown that any of the exceptions in R2 of the Code apply.

Can BoS delay making a decision under the CRM Code?

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.

However, where a firm has already issued a reimbursement decision – for example, by telling they 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 Lending Standards Board (LSB) confirmed in a letter 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 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 customer is entitled to have our Service decide the merits of the complaint about the payment 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. BoS can't seek to delay a decision it's already made. It had already reached a decision on D's claim in its final response letter and in its file to our Service. So, I don't think BoS can rely on this provision.

Is it appropriate to determine D's complaint now?

The 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 (which - as explained above - is the balance of probabilities).

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 D'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 D was the victim of a scam, rather than a failed investment.

I'm 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 D'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. BoS has not clearly articulated whether it considers this may be the case.

BoS may be concerned about the risk of D being compensated twice for the same loss. But I don't know how likely it is that any funds will be recovered as part of those proceedings. 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 BoS 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 R. More information about FSCS's position on claims submitted to FSCS against R 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 R 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 R has conducted activities that have contributed to the same loss D is now complaining to us about in connection with the activities of BoS.

As I'm upholding this complaint, for the reasons given below, Mr C should know that as D will be recovering compensation from BoS, it cannot claim again for the same loss by making a claim at FSCS (however, if the overall loss is greater than the amount it recovers from BoS, it 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 C has already made a claim at FSCS in connection with this matter, and in the event the FSCS pays compensation, D is required to repay any further compensation it receives from the complaint against BoS, 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.financial-ombudsman.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.

As BoS can ask D to undertake to transfer to it any rights it may have to recovery elsewhere, I'm not persuaded that these are reasonable barriers to it reimbursing it in line with the CRM Code's provisions.

So as the SFO has reached an outcome on its investigation, 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 around 18 months). 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. In summary, I don't think it would be fair to wait for other investigations to complete before making a decision on whether to reimburse D.

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

As referenced above, BoS 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 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 is met, as set out above.

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

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

From what I've seen and what Mr C has told us, I'm satisfied it made the payment with the intention of investing with the car leasing company. Mr C thought the funds would be used to purchase vehicles which would then be leased out, and that D would receive returns on the investment. I haven't seen anything to suggest that Mr C 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. And the evidence I've seen suggests the car leasing company didn't intend to act in line with the purpose for the payments it had agreed with D.

Mr C was told D's capital would be used to fund specific new vehicles and that it would be secured in D's favour until the loan was repaid, by way of a fixed charge. But there's no evidence this was the case or that D's funds were secured against a specific vehicle.

The FCA also checked a sample of the vehicles the companies held against the DVLA database and found a significantly larger proportion of these were second-hand than R's business model suggested or would support – as it relied on securing significant discounts on new vehicles, which wouldn't be available on second-hand vehicles.

It also found 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. And the FCA 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 one of the connected companies also said that the total number of 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.

I've not seen a record at Companies House of any charge in D's favour over any vehicle with the company following its investment. And, as I think the evidence shows the company was largely not carrying out this key aspect of the investments, I think it's safe to conclude that this wasn't done in D's case either.

So, I think the evidence shows the car leasing company wasn't acting in line with the business model and features of the investment it had led Mr C to believe D was making. And so, the purpose the company intended for the payments D made wasn't aligned with the purpose D intended for the payments.

The SFO has also said that the former company directors are accused of providing those who invested with false information and encouraging people to pay in whilst knowing that investments weren't, in reality, backed up by the cars they had been promised. So, I think the discrepancy in the alignment of the payment purposes between D and R was the result of dishonest deception on the part of the company.

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

Is D 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 D. 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. Another 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 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 CRM Code, but they do not apply in this case. Although BoS hasn't established that any of those exceptions apply, for completeness I find that none apply in this case.

I say this because the way Mr C was told the investment would work doesn't appear to be suspicious, and the returns he was told D would receive don't appear to be too good to be true. The investment material and communications with R I've reviewed appear professional, and there was nothing in the public domain at the time about R that Mr C could have reasonably inferred from that a scam was taking place.

It appears that the company had been operating for several years. One of the connected companies was authorised and regulated by the FCA, and a number of previous investors – including, to some degree, D – had received the returns they were told they would. So, I don't think there was anything about the investment that should have caused Mr C concern.

BoS hasn't alleged that D made the payment without a reasonable basis for belief that the investment was legitimate. It also hasn't said that it provided a warning at the time D made the transaction – so I can't fairly say it ignored an effective warning.

And so, I don't think BoS has established that any of the exceptions to reimbursement under the CRM Code apply here, and so it should refund the money D lost, with consideration to the returns received.

Putting things right

As D received monthly interest payments back from R in relation to the disputed investment, I think it would be fair for these payments to be deducted from the amount BoS has to refund it.

I don't think any action I would've expected BoS to take would have prevented D from making this payment, as I don't think any of the information I would have reasonably expected it to have uncovered at the time of the payments would have uncovered the scam or caused it significant concern. And I don't think it was unreasonable for BoS to initially decline D's claim under the CRM Code, as it wasn't clear from the evidence available at the time that this was a scam.

But the CRM Code allows firms 15 days to make a decision after the outcome of an investigation is known. So I think BoS should have responded to D's claim and refunded it losses under the CRM Code within 15 days of the SFO publishing the outcome of its investigation. And so I think BoS 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.

So in order to put things right for D, Bank of Scotland plc must:

- Refund D its losses, less the applicable returns received. I understand this amount to be £60,569.60;

- Pay D 8% simple interest per annum on that refund, from 15 days after 19 January 2024 until the date of settlement.

As the car leasing company is now under the control of administrators, it's possible D may recover some further funds in the future. In order to avoid the risk of double recovery BoS 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

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

Under the rules of the Financial Ombudsman Service, I'm required to ask D to accept or reject my decision before 22 April 2025.

Melanie Roberts
Ombudsman