

The complaint

Mr G complains that Clydesdale Bank Plc trading as Virgin Money ('Clydesdale') failed in their actions in relation to a recipient account, to which he sent money as a result of an alleged authorised push payment ('APP') scam.

What happened

The circumstances of this complaint are well known to both parties, so I will not go into every detail of what happened here. But, in summary, Mr G came across an art investment scheme operated by a company which I will call 'S'. He decided to invest, and made two payments which totalled just under £11,000 in August and November of 2022. S said that investors could invest in art and they would hold it on their behalf. S made numerous representations about the value of the art, the ability to sell the investments or convert the art to cash, and the ability of investors to access their art. However, Mr G, via his representatives, says that in many cases the art never existed and where it did, it was almost worthless. So, Mr G says he has fallen victim to a scam.

The money was sent to S's account which was held with Clydesdale, so Mr G complained to them on the basis that they had failed to properly verify their customer when they opened the account which allowed them to commit fraud against him. He also complained that Clydesdale failed to prevent the fraudster from sending huge sums of fraudulent funds from his account and failed to take appropriate action when notified of the fraud by Mr G's bank. Clydesdale considered Mr G's complaint but declined to uphold it. It said that it had undertaken a review and found no bank error in any of the complained about areas.

Mr S escalated his concerns to our service, where one of our investigators looked into what had happened. They did not recommend that Mr G's complaint be upheld on the basis that they thought the circumstances of the complaint represented a private civil dispute, rather than a scam. They said that this meant that the Lending Standard Board's Contingent Reimbursement Model ('CRM') Code did not apply – and Clydesdale had acted fairly in not reimbursing any of his losses.

Mr S remained dissatisfied. As no agreement could be reached, the case has been passed to me to decide.

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 in all the circumstances of a complaint, I'm required to take into account relevant: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having thought very carefully about Clydesdale's actions, I am unable to uphold Mr G's complaint. I do appreciate how disappointing this will be for him, but I don't think I can fairly say Clydesdale should reimburse him. I'll explain why.

There are some circumstances in which it would be fair and reasonable for me to ask

Clydesdale to reimburse Mr G if their failures could fairly be said to have caused his loss. For the reasons I'll explain, I don't think these would apply here. I'm sorry to hear of what has happened to Mr G, and I can understand entirely why he feels so strongly that the money should be returned to him. But not all cases where individuals have lost significant sums are in fact fraudulent and/or a scam.

Should Clydesdale reimburse Mr G under the provisions of the CRM Code?

When considering what is fair and reasonable in this case, I've also thought about the Lending Standards Board's voluntary CRM Code, which Clydesdale as the receiving bank has signed up to and was in force at the time Mr G made the payments. In some circumstances, the CRM Code would obligate Clydesdale to reimburse some of scam victim's losses.

I've thought about if the CRM Code applies in the circumstances of the payments Mr G made.

The relevant part of the CRM Code definition of an APP scam requires that the payment was made to: *"another person for what they believed were legitimate purposes but which were in fact fraudulent."*

The CRM Code is quite explicit that it doesn't apply to all push payments. It says:

"DS2(2) This code does not apply to:

(b) private civil disputes, such as where a Customer has paid a legitimate supplier for goods, services, or digital content but has not received them, they are defective in some way, or the Customer is otherwise dissatisfied with the supplier"

Subsections (a) and (c) have been omitted as they are not relevant to this complaint.

Both Clydesdale and our investigator felt the payments Mr G made formed part of a civil dispute rather than an APP scam and, as such, are not covered by the CRM Code. Mr G strongly disagrees. He has asserted, via his representatives, that S was a fraudulent scheme and that at the time Mr G made the payments S had intended to scam him and other investors.

In summary, following our investigator issuing their view on Mr G's complaint, his representatives said:

- The liquidator's actions, reports and view of what has happened have been unfairly and improperly considered or dismissed despite the liquidator's privileged position in terms of access to evidence and resources to investigate.
- The evidence in this case had not been considered holistically, instead each piece has been isolated to see if it was definitive proof of fraud.
- There had been a freezing order under the Insolvency Act 1986 against S following a claim of fraudulent trading by the company. The nature of the recent court proceedings had been used in an unreasonable way and to the detriment of the victim in this case, Mr G. This service had relied inappropriately on comments from the judge in this case about certain issues being better suited to a later trial as a lack of commitment to support an argument that fraud has occurred on the balance of probabilities.
- The judge's conclusions in this case should be seen to support the position that it is more likely than not that S was a fraudulent scheme, and was so at the time of Mr G's payments.
- S claimed to be a retailer, but they acted as a broker and gave investment advice, which is supported by what their brochures for clients said. The company offered to

provide advice, brokerage and expertise in these areas. They also offered personalized investment plans, returns and evidence of commissions on sales and profits.

- There were no genuine sales of investor prints – only resales back to S or other investors.
- S mislead investors about how profits were generated for S – claiming to only make the commission on sales and profits but it is argued that S made profit from significant mark ups on the wholesale price of art it acquired from its suppliers – one of which was run by the director of S.

For a payment to be considered part of a fraud or scam it must be established that the recipient's purpose in obtaining the payment was fraudulent. In other words, that the recipient had criminal intent at the time the payment was made and that there is convincing evidence to show this. The CRM Code definition of an APP scam requires that the real purpose of the payment was different to what Mr G had been led to believe, through deception.

I have thought about what Mr G's payment purpose at the time he made the payments. And I have carefully considered what was most likely to be S's purpose at the time of the payments, and whether this broadly in line with what Mr G understood to be the purpose of the payment.

Mr G explained that he believed that he was sending the money in order to purchase prints of artwork, as an investment. As I have outlined above, his representatives have made numerous arguments about why they think that S was operating a fraudulent scheme. They provided this service with a copy of a recent judgement handed down in relation to the freezing of S's accounts, and say that the judgement should be considered highly persuasive evidence that a scam has most likely occurred in Mr G's case.

It is important to note that the purpose of the hearing, and the burden of proof are different to those which I need to apply here. Our service decides cases on the balance of probabilities, which means that I need to be persuaded that it is *more likely than not* that this was a scam. I have considered the contents of the judgement carefully, and accept that the judge did indeed make a finding that there was a good arguable case that fraud had occurred. However, I do not think I can fairly extrapolate from this that it means that it is more likely than not that Mr G was scammed.

Misrepresentation of the investment scheme

I acknowledge that the court hearing does provide strong evidence that there was misrepresentation on the part of S with regard to the investment scheme. S appear to have given the impression that they were acting as brokers or intermediaries to the art investments, rather than a retailer of art. They said that the company would manage the investor's portfolios and provide advice in relation to what and when to purchase, and then when they should sell the art on, too.

I understand that this could lead to the potential for a claim of misrepresentation, and a breach of fiduciary duty. However, I do not think that this shows that there was a significant difference in the purposes of S and Mr G, who had broadly the same understanding for the reason for the payments. The reason for the payments was the purchase of art, with the secondary point being that S was going to manage Mr G's portfolio.

It is of note that the judge made multiple references to arguments about whether S had the intention to defraud customers like Mr G. However, the judge was clear that this was not something that they were considering as part of their judgement – and instead that these were matters to be considered at trial as they were not within the remit of the case they were hearing. The hearing purpose was to decide whether there was a good arguable case on the

merits to grant a freezing order for S's accounts. The reason for a freezing order is to secure funds so an investigation can take place. I do not agree that the granting of such an order can be seen to mean that a scam has taken place.

Mark-up of the artwork

I acknowledge that the judge accepted that the investment literature given to Mr G and other investors said that the only profit made by S was to be a 2% fee on sales of art to the investors, and 5% profit on any onward sales of art. The judgement shows that the investors were misled as to what was happening in this regard – in that S was buying art at wholesale prices and selling it on to investors at inflated prices. The mark up was significant – with an overall average of 495%. The judgement shows that S was not honest in that it failed to disclose its own interest and the enormous profits it was making on the sales to investors, because of this mark up. However, whilst many points were made about this issue, the judge was clear that this was a matter for trial.

However, the judge was provided with evidence that art was indeed purchased from companies and artists. There were also submissions which made clear that whilst the mark up was far higher than normal in this case, it was not unusual for retailers to inflate the cost of art. So, evidence of this substantial mark up does not mean that there is enough evidence to say this was a scam here. And as the judge explained, this would be a matter for trial.

Did the court hearing demonstrate that S misled investors about the secondary market for the artwork, and does this show that their purpose was not aligned with Mr G's purpose for the payments?

The judgement said that there was no real secondary market for the art prints, and that the only sales S facilitated were not genuine sales at auctions or by other means – this was at odds with what the investment literature said. The judge said that where there were sales, they were actually bought back by S, at an inflated price set by S, when an investor pushed for it to sell their prints. So, there was no actual increase in the market value of the art, and none of this was disclosed to investors. S used this buy-back scheme to persuade investors to further invest by buying more prints. S also encouraged investors to increase their portfolio size as a means to improve their chances of selling prints at a profit auction.

I acknowledge that the judgement and evidence presented do raise questions about the way the company was operating. There could also be a claim for misrepresentation. But the judgement also was clear that the merits of any claim of fraudulent activity taking place was not within the remit of the hearing and was something to be considered at trial.

Mr G's representatives have relied on the judge's findings that there is a good arguable case for fraud to argue that the judgement should be relied on to determine that it was more likely than not a scam. But I am not persuaded by this argument. I say this because the judgement itself is clear that the threshold for 'good arguable case' is a low one - the judgment says:

6. The test which has to be satisfied to establish a good arguable case on the merits was laid down by Mustill J in Ninemia Maritime Corp V Trave Schiffahrtsgesellschaft GmbH ("The Niedersachsen") [1983] 2 Lloyd's rep 600 605, as:

"... one which is more than barely capable of serious argument, but not necessarily on which the judge considers would have better than 50 per cent chance of success."

8. Given that the test sets a relatively low threshold on the merits

Despite the fact the judge said that this threshold was surpassed, given the low applicable test, I am not convinced that the judge finding there was a good arguable case on the merits equates to being more likely than not that investors were scammed. And as I have outlined above, the judge specifically says on numerous occasions throughout the judgement that such matters should be determined at trial. Mr G's representative's argument that the judgement confirms that S's true purpose was fraudulent, showing an intent to fraud, is not supported by the judgement itself.

Liquidators' commentary

Mr G's representatives provided our service with information from the liquidator which say that the art is being challenged as worthless. This does not mean that the art is indeed worthless, merely that an allegation has been made that it is. As the judgement made clear, this is something that would need to be considered at trial. Art valuation is a subjective matter – and whilst it is clear that the price of the art in this case was inflated, submissions to the court made clear that this is not unusual in this sector. The liquidator is not in a position to make any formal findings on this matter.

Whilst the liquidators said that the art was purchased through two different suppliers, one of which had connections to S and was a respondent in respect of the freezing orders, this does not change the fact that there appears to be a second independent supplier who provided art. And the liquidators' statement supports that the supplier linked to S did provide artwork, and that genuine trading costs were incurred.

The liquidator has not, and is likely unable to, provide the evidence they have relied on to make these statements. There is an ongoing investigation, so this is understandable. So, whilst I have noted their commentary, I have been unable to review the evidence they relied on, so I cannot say this is enough to prove on the balance of probabilities, that a scam has taken place.

So, considering everything I have outlined above, I cannot fairly be satisfied that I have seen enough evidence that S intended to defraud Mr G from the outset. I consider Clydesdale were fair in considering the matter a civil dispute which isn't covered by the CRM code and is therefore something that needs to be resolved between the two parties through alternative methods. And so it follows that I will not be asking Clydesdale to reimburse Mr G under the provisions of the CRM Code or under other rules and obligations.

As I'm not persuaded this was a fraud or scam, there was no basis for Clydesdale to have intervened in the operation of the recipient account or to have prevented the funds from leaving it for that reason. Nor can I fairly and reasonably conclude Clydesdale shouldn't have opened the account. In these circumstances, I can't fairly ask Clydesdale to do more in relation to the financial loss suffered by Mr G.

I realise that my decision will be disappointing for Mr G and I don't underestimate the impact this matter has had on him. But overall, for the reasons I've explained I can't fairly or reasonably ask Clydesdale to refund the money Mr G considers he has lost.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 29 December 2025.

Katherine Jones
Ombudsman