DRN-5802404

The complaint

Mr B is the trustee of a Pension Plan Small Self-Administer Scheme set up under trust (which I'll refer to as the 'SSAS'). He complains that Metro Bank PLC won't refund the money the SSAS lost when it was the victim of what Mr B feels was a scam.

Mr B and the SSAS are represented in this complaint, however for ease I'll refer to Mr B and the SSAS throughout.

What happened

Both parties are aware of the circumstances of the complaint, so I won't repeat them all here. But briefly, the SSAS held an account with Metro Bank Plc ('Metro'), and it wanted to invest some of the funds held with the bank. In February 2021, the SSAS was contacted by a property development company, which I'll call 'C' as Mr B had already invested with a company linked to C. After undertaking its due diligence, the SSAS decided that investment with C was in line with its investment objectives.

The SSAS signed an agreement with C which meant it would loan funds from the pension scheme to C. The SSAS said it believed the funds would be used for a specific property development as it was provided with information about this specific property. The agreement set out the terms of the agreement for the SSAS to lend £20,000 with the expected return after around a year of the £20,000 plus £3,900. The SSAS then transferred £20,000 to C on 7 May 2021 directly to C's bank account. The SSAS says it didn't receive any warnings from Metro when it made the payment to C.

The SSAS says it became aware in early 2022 that C had gone into administration. At this point, the SSAS became aware of other investors whose funds hadn't been used as expected. The SSAS believed that it had been the victim of fraud and complained to Metro as it said the bank had failed in its duty of care to protect it from being scammed when making the payment to C. The SSAS wanted Metro to refund its losses in line with the Lending Standards Board's Contingent Reimbursement Model (CRM) Code.

Metro didn't uphold the complaint. It said that it didn't consider that the losses had arisen as a result of an Authorised Push Payment ('APP') scam. Metro also said that the SSAS wasn't itself classed as a micro-enterprise as it ran independently from the company which sponsored it and therefore it didn't meet the eligibility criteria for a "customer" under the CRM Code. Metro also said the professional and member trustees would have undertaken due diligence to check the investment met the pension scheme's objectives before making the investment and that the payment had been made in line with the trustee's authority. So, Metro didn't think the CRM Code was applicable in this instance and declined to refund the SSAS's loss. The SSAS didn't agree and asked our service to look into its complaint.

Our investigator didn't recommend the SSAS's complaint be upheld. She didn't think that the SSAS met the eligibility criteria for a "customer" under the CRM Code which was defined as a consumer (acting for purposes other than a trade, business or profession), a charity with annual income of less than £1 million, or a micro-enterprise. The investigator said that to be a micro-enterprise, the SSAS must have been offering goods or services at a given price on

a given market, and she wasn't persuaded that was the case here. So, the investigator said she had considered if there was any other reason, outside of the CRM Code, that would mean Metro should refund the SSAS. However, she thought that even if Metro had questioned the payment with the SSAS it was unlikely in the circumstances it would have raised any concerns with the transaction, and therefore Metro couldn't have declined to proceed with the SSAS's payment request.

The SSAS didn't agree and asked that an ombudsman review its complaint. It said in summary that:

- It didn't agree that the SSAS failed to meet the definition of a "customer" under the CRM Code.

- Our investigator had wrongly relied on the European Commission's 'User Guide to the SME Definition' to determine whether the SSAS satisfied the definition of a micro-enterprise. This is only guidance not law and therefore not binding, comprehensive or definitive and was inconsistent with the purpose of the CRM Code.

- The correct definition of a micro-enterprise in law which should have been applied to the SSAS is 'any entity engaged in an economic activity, irrespective of its legal form.

- The SSAS satisfied the legal definition of a micro-enterprise as it was engaged in an "economic activity" by providing services within the market of pension funding and related services.

- There was nothing in the consultation or policy documents of the CRM Code to show that a SSAS was intended to be excluded from protection 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 have arrived at the same conclusion as our investigator, for broadly the same reasons.

But before I explain further why this is the case, I think it's important for me to note and recognise the strength of feeling about this matter. I've read and considered carefully the information provided by the SSAS, however, in this decision I've not commented on each and every point it has raised. I don't mean this as a discourtesy; this is simply due to the informal nature of this service.

Metro had 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). But the CRM Code only applies to specific customers and payments.

There is a question of whether the payment made by the SSAS should be considered as a fraudulent transaction or as a civil dispute under the CRM Code. However, I don't intend to consider that here as I'm not persuaded that the SSAS meets the eligibility requirements under the CRM Code.

Was it fair for Metro to decline to refund the SSAS under the CRM code?

The CRM Code defines a 'customer', as a 'consumer, a charity or micro-enterprise'. Everyone accepts that the SSAS is neither a consumer nor a charity for the purpose of this complaint. The key dispute here therefore is whether the SSAS meets the definition of a micro-enterprise under the CRM Code. Micro-enterprise is a defined term under the CRM Code which states that "a Micro-enterprise, as defined in regulation 2(1) of the PSRs, that is, in summary, an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million".

In summary, the SSAS says that the CRM Code should be treated as a contract or quasi-contract and be interpreted as a matter of contract law. In particular, it says the CRM Code should be interpreted using the natural and ordinary meaning of any words within it and based on what a reasonable person would understand. It also believes that our service has only applied the definition of a micro-enterprise under the European Commission's 'User Guide to the SME Definition' and is unfair as this definition should only be used as guidance. The SSAS also says the purpose of the CRM Code is to offer protection to customers with limited financial activities, and it's unlikely that when the CRM Code was created, there was an expectation that the 'User Guide to the SME Definition' would be relied upon.

The rules that govern this service are set out in the Dispute Resolution (DISP) Rules which can be found in the FCA Handbook. Of particular relevance here are DISP 3.6.1R which says:

> "*The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case."*

and DISP 3.6.4R which set out the following:

> "*In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:*
>
> *(1) relevant:*
>
> *(a) law and regulations;*
> *(b) regulators' rules, guidance and standards;*
> *(c) codes of practice; and*
>
> *(2) (where appropriate) what he considers to have been good industry practice at the relevant time."*

I've carefully considered the SSAS's arguments and requests in response to the investigators view. However, micro-enterprise is a defined term under the CRM Code and therefore I have attached that definition to its meaning, rather than using its "natural and ordinary meaning" which the SSAS would like me to use.

And although the SSAS says that our service has only taken into account the definition of a micro-enterprise under the European Commission's 'User Guide to the SME Definition', I want to reassure the SSAS that whilst this definition has been considered as part of my investigation, it is not the basis for my decision. Indeed, the starting point for my decision is the CRM Code itself which relies on the micro-enterprise definition under regulation 2(1) of the PSRs which states:

> *"micro-enterprise" means an enterprise which, at the time at which the contract for payment services is entered into, is an enterprise as defined in Article 1 and Article 2(1) and (3) of the Annex to Recommendation 2003/361/EC of 6th May 2003 concerning the definition of micro, small and medium-sized enterprises".*

Article 1 of the Annex of the Micro-Enterprise Commission Recommendation 2003/361/EC mentioned above says:

> *"An enterprise is considered to be any entity engaged in an economic activity irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity."*

The SSAS says that it satisfies the definition under regulation 2(1) of the PSRs on the basis it was engaged in an "economic activity" at the relevant time, which case law interprets as "Any activity consisting in offering goods and service on a given market […] whether the activity consists in the provision of … services […] and whether there is a market for the relevant… services […] services on that market is an economic activity, even if the services in question are provided free of charge and/or without a view to making a profit."

The question for me therefore is whether the SSAS was engaged in an economic activity at the time of the payment transaction. I have given this question a lot of thought and, in doing so, I have come to the conclusion that the SSAS was not engaged in an economic activity at the relevant time, and consequently it fails to satisfy the definition of "micro-enterprise" under the CRM Code.

While the Micro-enterprise Recommendation does not define economic activity itself, Recital 3 provides that "enterprise" should be interpreted in accordance with CJEU case law. In my view, the relevant principles derived from CJEU case law may be summarised as follows:

- Any activity consisting of offering goods or services on a given market is an economic activity.

- It is not sufficient for an organisation to be merely involved in the purchase of goods or services. There must be some economic goal or aim which those goods or services would be put to.

It follows that the purchasing or commissioning of goods or services cannot in itself constitute an economic activity.

The SSAS itself is an instrument for funds to be paid into by, and held for, the beneficiaries of the trust until such time as the trustees decide when and how those funds should be invested for profit or drawn down.

In my view, where the purpose of entering into an investment is merely to generate profit for the beneficiaries under the trust, that investment is more akin to the purchase of goods or services. As a matter of logic, outputs of investment which are solely internal are not engaging with a market, which must, necessarily, be external to that organisation. In such circumstances, there is no goods or services which are being offered to a given market.

So, I'm sorry to disappoint the SSAS's representatives but I agree with our investigator, that I don't think the SSAS itself is engaged in economic activity in the sense provided by the Micro-enterprise Recommendation.

I also acknowledge the SSAS says that the CRM Code was a voluntary code which was put in place in part to increase the number of customers who should be protected from the impact of APP scams. It also says that there was nothing in the CRM Code to show any intention that pension trusts should be excluded from the protection provided under the CRM Code, so it is unfair for our service to exclude the SSAS from the protection of the CRM

Code. However, although I agree that a particular feature of the CRM Code was the desire to provide protection to more customers, this is provided on the basis that the enterprise in question falls properly within the definition of customer.

In summary, my role in the circumstances of this complaint, is to say whether it was fair and reasonable for Metro to decline to reimburse the SSAS. In making that determination, I've considered whether the CRM Code should apply. As I have explained above, I don't think the SSAS meets the definition of a Micro-enterprise under the CRM Code, so I'm satisfied Metro has behaved reasonably here.

Should Metro have done more to protect the SSAS?

So, I've gone on to consider whether there is any other reason that Metro should fairly and reasonably refund the SSAS's loss. The regulations relevant to this case are the Payment Services Regulations (the PSRs). These explain that, generally speaking, account holders will be liable for payments they've authorised, and banks will be liable for unauthorised payments. I've taken this into account when considering what's fair and reasonable in the circumstances of this complaint.

Here it's not in dispute that the payment was authorised, so the starting position is that the bank isn't liable for the transaction. But this isn't the end of the story. Metro has a duty to exercise reasonable skill and care, pay due regard to the interest of its customers and to follow good industry practice to keep customer's accounts safe. This includes looking out for payments which might indicate the consumer is at risk of financial harm.

Taking these things into account, I think Metro should fairly and reasonably have had systems in place to look out for out of character or unusual transactions, or other signs that might indicate that its customers were at risk of fraud. So, I need to decide whether Metro acted fairly and reasonably in its dealings with the SSAS here, and if I think it should have done more before allowing the £20,000 payment to leave the SSAS's account. Based on what I've seen, I don't think this payment would have aroused any suspicion of fraud or a scam.

I say that because I've reviewed the SSAS's previous account activity, and I'm not satisfied the payment was so unusual or out of character that Metro should have identified a potential scam risk. The SSAS's account statements show that, albeit not recently, the SSAS had previously made payments for £40,000 and £29,000 using the same payment method. Metro has to strike a balance between identifying payments that could be fraudulent and responding appropriately based on its concerns, whilst also ensuring there is minimal disruption to any legitimate payments. In this case, I'm not satisfied that the payment was significantly out of character for the account that Metro should've been so concerned about the £20,000 payment that it ought to reasonably have intervened to prevent the payment being sent.

But in any event, even if I thought that Metro ought to have identified that the £20,000 may be fraudulent, the subject of a scam or out of character for the account, I don't think that would have prevented the SSAS from making the payment. I say that because there were no public warnings or alerts about fraud or scams involving C at the time which reasonably should have alerted Metro about the legitimacy of the investment that the SSAS was making. Furthermore, I think if Metro had contacted the SSAS's trustees, they would have confirmed that the payment was for an investment and referred to the documentation the SSAS had been provided by C. And given that one of the SSAS's trustees had already invested with C, I think that even if Metro had asked further questions, the SSAS would still have requested that the payment be made.

The SSAS hasn't said that it wasn't given a warning by Metro when it made the payment to C, only that the bank failed in its duty of care. However, even if Metro had given the SSAS an effective warning about investment scams at the time, I'm not persuaded that would have made a difference here. I say that because the SSAS has already told us that it undertook its due diligence at the time of making the payment, and it was satisfied that it was making a legitimate investment. So don't think a warning would have prevented the payment being made.

I'm sorry to disappoint the SSAS's representatives but based on the evidence available to me I don't think Metro has acted unfairly or unreasonably here, so I won't be asking it to do anything further.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask B to accept or reject my decision before 2 December 2025.

Jenny Lomax
Ombudsman