

The complaint

Miss P complains that Bank of Scotland plc (trading as Halifax) won't refund the money she lost to an investment scam.

What happened

Miss P found a company I'll call 'M' through her former FCA regulated broker (ML). ML advised Miss P that he'd conducted due diligence on M's mini bond offering and felt it was a good opportunity for her. She invested £200,000 over eight payments between 10 April 2017 to 11 May 2017.

When M failed to deliver their bond in line with their marketing material, Ms P threatened to report them. She was able to recover £174,000 of her investment from them.

Miss P contacted Halifax in 2020 to inform it she was deceived into paying M but Halifax advised her it couldn't assist.

Miss P contacted Halifax again in February 2023 as she felt it could have done more to protect her from financial harm. Halifax issued its final response on 3 March 2023. It declined to refund Miss P on the basis that the Contingent Reimbursement Model (CRM) Code didn't apply. Halifax didn't find that it could have prevented Miss P's loss.

Unhappy with its response, Miss P referred her complaint to this service.

One of our Investigators looked into things and didn't think Halifax acted unreasonably. She didn't think that Halifax could have prevented Miss P's loss.

Miss P didn't agree. She said in summary:

- Our investigator's findings contradict another complaint that our service looked into relating to her father investing in M.
- She was not a customer of the beneficiary of the funds as the funds were intended for M as confirmed by the liquidator.
- Funds she paid to another party prior to the scam was the return of a loan and not an investment, which she informed Halifax of.
- Payments she made to another bank were payments to her own stocks and shares trading account, which she informed Halifax of.
- Had Halifax intervened, it would've likely warned her about potential scams and the very high risks associated with unregulated investments, she'd have looked into things further and wouldn't have proceeded with her payments.
- Halifax simply sent a text checking whether Miss P authorised the transaction and did no further checks.
- The liquidator's findings indicated that M acted dishonestly and were deceptive, amongst other things.

- Had Halifax intervened, it would have realised that Miss P had never invested in unregulated investments and she'd have looked into this further. Prior to this, she only ever transferred money to trusted individuals known to her and her own external bank accounts.
- The reason she sought advice in the first place was to ensure she had capital protection due to her inexperience. The recipient of the funds was a regulated company but were only a 3rd party that handled payments for M.
- Her history with ML would have made no difference to her making the investment if Halifax had intervened. ML had only provided her with advice on a handful of occasions, under his principal firm (TJM) for approximately nine months before he recommended the M bond. During that time, ML only provided advice on regulated products and she didn't understand the difference.
- Had Halifax intervened, it could have spotted the nuances in the situation she found herself in.
- The ICO agreed that TJM were in breach of their conduct and if Halifax had probed her further about ML not using a TJM email and phone line, this could have revealed his misrepresentation which was a breach of his FCA license.

The complaint has therefore been passed to me for determination.

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 don't uphold this complaint and I'll explain why.

Before I go onto explain why, I acknowledge Miss P is unhappy that this service reached a different outcome in relation to her father's complaint which were very similar circumstances. It may help if I explain that we consider complaints on their individual merits and we also offer a two-stage process - should either party disagree - where an Ombudsman can make a final decision. In the complaint referenced by Miss P, I don't see that it went through our two-stage process, nor did we make a final decision on it, it was resolved informally.

Although I've considered all of the evidence raised by both parties, I may not comment on all the points raised as I'll focus on what I think the key points are. But I assure both parties that I have considered all the submissions made very carefully.

Not every complaint referred to us as an investment scam is in fact a scam. Some cases simply involve high-risk investments that resulted in very disappointing returns or losses. Some investment companies may have promoted products like mini-bonds (which is the subject of this dispute)—which were not regulated by the FCA—using sales methods that were arguably unethical and/or misleading. However, whilst customers who lost out may understandably regard such acts or omissions as fraudulent, they do not necessarily meet the high legal threshold or burden of proof for fraud, i.e. dishonestly making a false representation and/or failing to disclose information with the intention of making a gain for himself or of causing loss to another or exposing another to the risk of loss (Fraud Act 2006).

Banks and other Payment Services Providers ("PSPs") have duties to protect customers against the risk of financial loss due to fraud and/or to undertake due diligence on large transactions to guard against money laundering (see below). But when simply executing authorised payments, they do not have to protect customers against the risk of bad bargains or give investment advice — and the FCA has confirmed that a fraud warning would not constitute unauthorised investment advice.

So, the first question to resolve is whether M was actually a scam.

Was M operating a scam?

When considering this for Miss P's case, I've paid particular attention to the official organisations that publish warnings about merchants that operate in the UK and abroad. I've searched the Investor Alerts Portal of the International Organization of Securities Commissions ("IOSCO"), the international body that brings together the world's securities regulators. And the FCA (as the UK regulator) also has its own warning list, which is in place to share alerts and insight about companies that have been identified as potentially being fraudulent.

Upon checking both of these, it's my understanding that M has no adverse information reported about them. Indeed, my own research hasn't resulted in any compelling information to show it was fraudulent.

I've also noted that Miss P received credits from the investment (almost on a monthly basis) between April 2017 to November 2017 totalling £49,000. Miss P then received another £125,000 over a year after her final payment to M. In common circumstances of investment fraud, the beneficiary disappears with most of the money as quickly as possible. So, it's highly unusual that Miss P received returns from an alleged fraudster so long after her initial investment.

Miss P suggests M was a Ponzi scheme but I have no credible evidence that this was the case at the time of Miss P's payments, or at the time of writing this decision.

I've seen some adverse customer reviews about M and Miss P has highlighted some findings of the liquidator and I cannot ignore that, while this could be seen as circumstantial evidence that helps build an overall picture of M – this is not in itself sufficient evidence of fraud.

I must therefore take into account that there's strong evidence here – particularly because there is no credible adverse evidence that was published at the material time – that M hadn't been identified as a fraudulent company when these payments were made.

I'm not persuaded with any degree of certainty that M was operating a scam. So, taking everything into consideration, I'm not persuaded that M was in fact a fraudulent company.

But even if I'm wrong and M are proven to be fraudulent, I'll consider in any event whether I think Halifax could have prevented Miss P from sending her payments. To do this, I must consider whether:

1. Any of Miss P's payments ought to have reasonably appeared unusual or uncharacteristic to Halifax?
2. Is so, would Halifax's intervention have made a difference or prevented or reduced the loss?
3. And if so, should Miss P bear some responsibility for the loss such that it would be fair and reasonable to reduce compensation proportionately.

Were any of Miss P's payments unusual?

It is common ground that the disputed payments were 'authorised' by Miss P for the purposes of the Payment Services Regulations 2009 ('the Regulations'), in force at the time. This is because they were made by Miss P using the legitimate security credentials provided to her

by Halifax. These must be regarded as 'authorised payments' even though Miss P says she was the victim of a scam. So, although from her perspective, she did not intend the money to go to scammers, under the Regulations, and under the terms and conditions of her account, Miss P is presumed liable for the loss in the first instance.

However, taking into account the law, regulatory rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I consider Halifax should fairly and reasonably:

- Have been monitoring accounts—and any payments made or received—to counter various risks, including anti-money-laundering, countering the financing of terrorism, and preventing fraud and scams;
- Have had systems in place to look out for unusual transactions or other signs that might indicate its customers were at risk of fraud (amongst other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer; and
- In some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

Like our investigator, I don't find Miss P's first two payments (£25,000 on 10 April 2017 and £25,000 on 11 April 2017) were all that unusual when considering her previous account activity. For example, on 18 April 2016 Miss P made a transfer payment of £25,000, on 14 July 2016, she made a transfer payment of £25,000 to a company ('S') and on 15 July 2016 she made a transfer payment of £25,000 to S. I appreciate Miss P has provided some context as to the purpose of the payments but I don't think Halifax would have reasonably known the exact purpose of any of her payments and I don't think it could have reasonably suspected unusual activity when Miss P sent her two payments towards the M investment.

I do however think Halifax should have reasonably intervened when Miss P made her third payment of £25,000 towards her M investment on 11 April 2017. This was the third consecutive payment totalling £75,000 in a very short space of time and very unusual for Miss P when considering her normal account activity. Miss P advised Halifax did no more than send her a text message authorising her payments and I accept her version of events as Halifax hasn't provided anything to the contrary.

In my judgement, Halifax missed an opportunity to intervene.

Would an intervention have made a difference?

If Halifax had fulfilled its duties by asking suitably probing questions, there is no reason to doubt that Miss P would have explained what she was doing and that the purpose of the payment was to invest.

In such circumstances, whilst Halifax had no duty to protect her from a bad bargain or give investment advice, it could have reasonably asked Miss P some further questions to ascertain whether she was likely to be at risk of financial harm from fraud. I've thought carefully about the sorts of questions Halifax should've asked, bearing in mind the features of investment scams at that time.

At the time Miss P fell victim to the scam, investment scams carried some common features. For example, these included rates of return which were too good to be true, receiving the opportunity to invest via an unsolicited cold call, with fraudsters often applying pressure to their victims to invest quickly.

Against this backdrop I'd have expected Halifax to ask Miss P some questions to see if there were any signs that this was an investment scam (as described above). I think Halifax would have reasonably asked what it was Miss P was investing in and I think she'd have explained she was investing in bonds. I think Halifax would have reasonably been aware that mini-bond providers weren't required to be regulated by the FCA. But I think it would have also acknowledged these investments could be high risk, so I think Halifax could have asked how Miss P had come across the investment. I think Miss P would have likely explained that the investment was recommended by her financial adviser who she'd been dealing with for some time and believed to be FCA regulated. I don't think Halifax would have reasonably been expected to probe the legitimacy of ML based on Miss P's previous dealings with him.

I would have reasonably expected Halifax to query whether Miss P knew where the funds were going. At which point, I think she'd have likely explained that the funds were being made to an FCA regulated payment service provider – something that was explained on M's paperwork. Miss P may have also disclosed the indicated rate of return.

Upon receiving this information from Miss P, I'm not persuaded Halifax would've been concerned that Miss P was about to fall victim to an investment scam as there were no obvious indicators of what I consider to be well published investment scam typologies at the time. I accept the rate of return was higher than what a high street bank would've offered, but mini-bonds do often have higher rates of return and I don't think it was 'too good to be true'. I accept the rate of return potentially indicated a high-risk investment, which might not have been suitable for Miss P, but as I've explained, it would not have been Halifax's role to provide her with financial advice.

From her understanding, her capital was secure and she'd already queried the promised rate of return with ML.

Nevertheless, I think Halifax should've gone on to ask Miss P what checks she'd done to establish the legitimacy of the investment.

I've seen that Miss P had conversations with ML about the investment prior to investing, so I think she'd have explained she discussed the investment with her financial adviser. Miss P was provided with detailed booklets about the investment which included a booklet about the bond as well as an insurance summary. Looking at the booklet provided to Miss P, it confirmed the investment was made through an FCA regulated payment service provider and according to the FCA's website, this payment service provider was authorised to provide the relevant services at the time Miss P made her payments. I think Miss P would likely have explained this to Halifax. I don't think Miss P would've got into the detail of what these documents said, and I don't think Halifax should've asked to see them in the circumstances of this case given there were no other indications of fraud. But even if it had, I don't think it would have had any reasonable concerns. I think as a result it's more likely than not Halifax would've been satisfied Miss P wasn't at risk of falling victim to an investment scam, Miss P would've felt comfortable continuing with the payment, and it would've been processed. This would've been a reasonable step for Halifax to take in the circumstances.

Even if Miss P did have concerns about investment scams following a conversation with Halifax, which for the avoidance of doubt I don't think she would have, I think it's more likely than not she would have directed them to ML rather than an independent third party and that's because she trusted him. It's also relevant that had Miss P attempted to verify the payment service provider was regulated by the FCA, she would've discovered they were who she'd been told they were.

It's also notable there were no warnings at that time about M or mini-bonds as a product. I've noted that the FCA published more information about mini-bonds in May 2019 and highlighted some risks involved with investing in such instruments. But this information was published almost two years after Miss P made her payments.

The FCA temporarily banned the mass marketing of speculative mini-bonds to UK retail consumers from January 2020, whilst it consulted on permanent rules. It made the temporary ban permanent the following year. I don't think Halifax could have been reasonably aware of this given that this information was published almost two years after Miss P made her payments.

Given I've found that it's more likely than not an intervention from Halifax wouldn't have made a difference and exposed the alleged scam, it is unnecessary for me to go on to consider whether Miss P should share any responsibility for the loss she incurred.

Recovery

Halifax needed to be satisfied that Miss P was the victim of an authorised push payment fraud in order to take steps to recover her authorised payments from the beneficiaries. I've seen that Halifax were not satisfied that Miss P was the victim of an authorised push payment scam as it considered she paid a legitimate company who had gone into liquidation. So it didn't contact the beneficiaries. I don't find this to be unreasonable in the circumstances.

Halifax explained to Miss P that she should continue to liaise with the liquidators of the companies that she paid. I've noted the liquidators confirmed to Miss P that there was little chance of her recovering her funds and so I don't think it's likely that Halifax could have recovered any of her funds even if it had tried given the liquidators involvement.

Overall, whilst I agree that Halifax didn't do what it ought to have done by intervening in Miss P's payment towards her investment with M, I don't find that it was the primary cause of Miss P's loss. In other words, I don't think Halifax could have prevented Miss P from making the payments towards her M investment, nor do I think there was any indication that Miss P had fallen victim to a fraud or scam at the material time, such that I would make an award against Halifax. I know this will be an extremely difficult decision for Miss P to receive.

My final decision

My final decision is that, despite my natural sympathies for Miss P's loss, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss P to accept or reject my decision before 1 January 2024.

Dolores Njemanze
Ombudsman