

The complaint

Limited company S complains that HSBC won't reimburse it for payments made by its director to an investment scheme that has since been revealed to have been fraudulent in nature.

While S is represented by a Claims Management Company in bringing this complaint, for clarity, as far as possible I will only refer to S and its director Mr N in what follows.

What happened

Mr N is a director of limited company S. He says a friend told him about an investment opportunity in late 2019 (I'll refer to this scheme as M).

M apparently offered exceptionally high returns, in excess of 10% per month. It did so supposedly through importing and reselling mobile phones.

However, it has since come to light that M was operating fraudulently. It appears M was essentially a so-called Ponzi scheme, paying out returns from later investors' money rather than from profits.

S held a business banking account with HSBC. Between 7 February 2020 and 8 May 2020, a total of £12,000 was sent directly to M from S's business account.

While initially all seemed well, and a credit of £8,560 was received from M on 1 May 2020, it appears later returns failed to arrive and it has not been possible to recover the capital. Ultimately, Mr N lost £3,440 to M, net of the returns received in May 2020.

S reported this as an Authorised Push Payment scam (APP scam) to HSBC. S also reported it to the bank that received the payments, the complaint about which has also been referred to this service but does not form part of this decision.

HSBC declined to refund the payments – it didn't consider it was liable to do so.

Our Investigator looked into S's complaint about HSBC. She didn't think HSBC was required to refund the payments. She said that the evidence led her to believe the funds sent from S's account had been invested for the personal benefit of Mr N, not for business purposes connected to S. She didn't think it would be fair to ask HSBC to reimburse S in these circumstances.

S didn't agree. It provided further information and, in summary argued:

- It accepted that the investment with M had been held in Mr N's name, but this didn't mean the investment belonged to him.
- Chat messages between Mr N and his fellow director showed them discussing M. The fellow director noted he had personally invested £40,000 from his savings.

- Mr N had told our Investigator he couldn't have invested personally at that point due to his personal circumstances. He said the money had been sent from S's account, but his fellow director had given their consent to the investment being held in Mr N's sole name. This consent had been evidenced by the use of the word 'we' (and similar) in the chat messages in relation to the investment.
- While the Investigator had noted that the credit received from M appeared to have been sent onwards from S to another individual using a payment reference related to M, S said this had simply been an administrative error by its accountant. That payment out didn't in reality have any connection to the returns received from M and didn't reflect the true nature of the payment.
- Other evidence from its accounting software showed the payments to M were sent from S's business bank account – which it said showed this had been a business investment.
- S evidenced the purchase of a van in 2023, and said it would have bought this sooner, but for the scam. Chat messages showed the directors discussing the merits of a van advertised for sale in 2020.
- Mr N held a bank card in his name which allowed him to make payments from the business bank account. This proved he and the business were interchangeable in this context.

The Investigator considered these arguments and the evidence. But she remained persuaded on a balance of probabilities that this investment had been held in Mr N's individual capacity and not that of S. S had not suffered the financial loss.

In light of the disagreement, I have been asked to reach a final decision on the matter.

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.

A key question for me to determine here is whether these payments were for an investment belonging to S, or alternatively went to an investment belonging to Mr N. I will predominantly focus in what follows on what I consider to be the essential elements pertinent to a fair determination in all the circumstances. However, in reaching my findings, I would reiterate that I have taken into account all of the evidence and arguments that have been put forward.

Mr N brings this complaint, but does so as the director of S, not in a personal capacity. He recalls that he was initially made aware of M by a friend. He says that friend had themselves invested personally in M and it appeared they'd received returns on their investment.

Some of the evidence Mr N provided to our investigator in support of his complaint about HSBC relates to other investors in M, including that friend. Mr N says this illustrates what he received himself, although he says he no longer has access to much of the correspondence he received. That which Mr N has been able to provide, and which relates to the disputed payments from S's account, refers solely to Mr N. There is no mention of S in those emails or documents.

Mr N has however been able to provide a copy of the initial investment contract. This is a very brief document setting out the basis of the investment. The first party to the contract is M's director. Adjacent to that director's name, the contract indicates their status as the owner

of limited company M. Therefore, I read this as indicating that this person was entering into the contract on behalf of the limited company M, in the capacity of its director.

The second party is named as Mr N. Against Mr N's name is simply shown the word "Investor". There is no mention of this investment being made on or on behalf of S. There is no reference to S anywhere in the document. Nor is there any indication that the investment being made by a limited company or that Mr N was acting in the capacity of a director. Rather, it is consistent with this being an investment in Mr N's personal name.

Mr N has told our Investigator that he'd have preferred the contract and investment to have been in the name of S. He says he was told by M it could only accept investments in an individual's name, although says he has no record of that communication besides his recollections. But he says he intended this to be S's investment, not his.

Where there is contradictory evidence, as I find there is here, I am required to reach my findings on the balance of probabilities – in other words on what I consider to be most likely given the information available to me.

I accept that the fact that while S's Companies House records show S to be a heating and air-conditioning company, not one involved in investment activities, or in an industry sector connected to M's business, this does not necessarily mean S could not have entered into an investment of this type in its own right. But equally, there was no barrier to Mr N having done so in his own right.

I find it significant though that there is a lack of any reference to the investment being made by S on either the contract papers or any associated email correspondence. This seems inconsistent with this having been an investment entered into by Mr N on behalf of S.

I am not persuaded the chat messages between Mr N and his fellow director somehow alter this situation. None of the messages I've seen show any explicit discussion about the true ownership of the investment being different to how it would nominally appear. Rather these suggest that both were investing, that the other director had separately invested from his own savings, and that money could be taken from S's account for the next investment round offered by M. On the face of it, this simply doesn't seem inconsistent with that latter investment being Mr N's.

Overall, taking all the evidence into consideration, on a balance of probabilities I find it most likely this investment was one owned by Mr N. I accept that I cannot know for certain whether that was what S or Mr N actually intended, but that is what the contemporaneous records appear to me to show was the case, intended or not.

Of course, Mr N and S are separate legal persons - they are not one and the same even if Mr N believes they are. Mr N's argument that he holds a bank card for the business account with his name on the front does not demonstrate he and S are the same entity. Rather, this shows he is an authorised signatory on behalf of S. S, as a limited company, retains a separate legal identity from Mr N.

This distinction is not an arbitrary one. That separation has the consequence that an investment owned by Mr N is not the same as one owned by the limited company S.

As such these payments had the effect of Mr N withdrawing an asset from S for his own use and Mr N making an investment in his own name with that asset. I think it most likely that the associated payments would constitute a loan from S to its director Mr N (in the absence of any evidence to the contrary – although the following logic holds for similar reasons were this alternately established to have been a return of capital or some other debt or dividend

owed by S to Mr N).

Mr N then lost those funds he invested, through the scam perpetrated by M. But S has not suffered a loss – Mr N has, which is not the same thing, as explained above. The money is therefore owed by M to Mr N. But (if treated as a director's loan) the debt resulting from the payments made from S's account is owed by Mr N to S.

It follows that any reimbursement now sought by S in respect of those payments should be addressed in the first instance to Mr N. It is not properly directed to HSBC, there is no loss on S's part for which I can fairly hold the bank responsible. And similarly, I cannot fairly require HSBC to consider the payments under the terms of the CRM Code – S has not suffered a loss and so the payments do not fall within the scope of what the code is intended to cover. Neither do I consider it fair and reasonable to hold HSBC liable for these payments for any other reason.

All considered and given what I have set out above, I do not find it would be fair and reasonable in all the circumstances of this specific complaint for me to require HSBC to refund S.

My final decision

For the reasons set out above, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 10 January 2024.

Stephen Dickie
Ombudsman