DRN-4533620

The complaint

Mrs A and Mr A complain that HSBC UK Bank Plc won't refund the money they lost to an investment scammer.

Mrs A and Mr A are represented by a third party, but as Mr A had most of the dealings with the scammers and for ease of reading, I'll refer to him alone in this decision.

What happened

In mid-June 2021, Mr A was looking for opportunities to better his financial predicament. He says he was in a vulnerable position as he'd stopped taking medication to manage his depression and anxiety (unbeknownst to his consultant). Upon browsing on an employment-focussed social media platform, Mr A received a request from a trading company I'll call 'C'. Mr A says he felt that C was professional and he was interested in the investment opportunities they had to offer. He saw that C had a large social media following and so he accepted C's request and responded to their message.

After receiving further information from C about how the investment would work and after searching C online and being persuaded by what he found, Mr A decided to invest. Mr A was appointed a senior account manager (the scammer) who Mr A felt was very knowledgeable. The scammer advised Mr A to open an account with a crypto exchange I'll call 'B'. The scammer advised Mr A he could convert his GBP into the required currency needed for C's trading platform.

Mr A opened an account with C after providing his personal details (including his ID documents). He was then given access to C's trading platform. The scammer guided Mr A on what to do through the use of 'AnyDesk'.

From 25 June 2021 to 23 August 2021, Mr A sent 13 payments totalling £46,450 to B from his HSBC current account (via faster payment and debit card payments). After converting his GBP to crypto on his B crypto exchange account, Mr A sent that crypto to his C trading platform.

After making his first deposits, Mr A saw the scammer place several trades (on his behalf) and Mr A was able to manually close trades when he wished. Mr A said actively watching and participating in live trades made everything seem genuine. And seeing his trades doing well is what persuaded Mr A to invest further funds.

Mr A says he asked the scammer about the withdrawal process. She confirmed it was very easy, however she explained that withdrawing may potentially stunt the growth of Mr A's account and Mr A trusted the scammer as she was an expert.

Mr A continued to invest via other banking providers and sent over £300,000 via another banking provider. He obtained the funds by way of business borrowing. Around early November 2021, Mr A asked to withdraw his funds and the scammer explained he'd have to pay several fees (including taxes) to do so. He made payments in accordance with the scammers instructions but his withdrawal request didn't materialise. Mr A found that the scammers behaviour became more suspicious, and he seized all communication with the scammer after realising he'd been scammed.

By December 2021, Mr A said C's website had been removed.

Mr A reported the scam to HSBC around 9 December 2022. HSBC said Mr A never made it aware of his vulnerabilities prior to the scam taking place. It said he made no attempt to contact the bank for a considerable period and its systems didn't detect the transactions as fraudulent. It said it didn't ban transactions to B and ultimately didn't agree to refund any of Mr A's disputed transactions.

Unhappy with HSBC's response, Mr A referred his complaint to this service.

One of our Investigators upheld the complaint in part. She felt there were unusual transactions and a meaningful warning would likely have made a difference to Mr A. But she also felt he should share responsibility for some of his losses as the returns were too good to be true and there was a warning published about C at the time of his investment. Mr A didn't agree. He didn't think he should share any responsibility for the losses as it was a very sophisticated scam and no warnings were present at the time he invested with C.

The complaint has therefore been passed to me for determination.

On 4 December 2023, I issued a provisional decision not upholding Mr A's complaint. For completeness, I repeat my provisional findings below:

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 intend to uphold this complaint.

Before I go onto explain why, I've noted that our investigator (on more than one occasion) asked Mr A for all his correspondence with the scammer, along with mobile phone messages. Mr A provided limited email communication with the scammer and explained that he deleted all of his mobile phone messages with the scammer. So, I've based my decision on the evidence I do have available. I've also not commented on all the original complaint points and only focussed my decision on what remains in dispute.

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.

There's no dispute from either party that Mr A was the victim of a scam. The evidence before me also indicates that Mr A was the victim of an investment scam. Having concluded that this was a scam rather than just a genuine investment that went wrong. I must now go on to consider three more issues in order to determine the outcome of the complaint:

1. *Were any of the payments Mr A made out of character and unusual and should HSBC have intervened before processing them?*
2. *If so, would HSBC's intervention have made a difference and prevented or reduced the loss?*
3. *And if so, should Mr A bear some responsibility for the loss such that it would be fair and reasonable to reduce compensation proportionately.*

<u>Were any of the payments out of character and unusual and should HSBC have intervened before processing them?</u>

It is common ground that the disputed payments were 'authorised' by Mr A for the purposes of the Payment Services Regulations 2017 ('the Regulations'), in force at the time. This is because they were made by Mr A using the legitimate security credentials provided to him by HSBC. These must be regarded as 'authorised payments' even though Mr A was the victim of a scam. So, although he did not intend the money to go to scammers, under the Regulations, and under the terms and conditions of his account, Mr A 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 HSBC 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.*

Neither party disagrees with our Investigator's view that Mr A's seventh payment to B dated 21 July 2021 ought to have been considered unusual. I think this is fair. Payments one to six were all under £5,000 with sufficient time and space between them. I don't think they indicated a pattern of spend that HSBC ought to have reasonably suspected a fraud or scam could be taking place. But payment seven totalled £2,500 and it was made on the same day as payment six (£4,000) – taking the spend in that day to £6,500 which was very unusual for Mr A. I also agree that it would've been reasonable for HSBC to have intervened.

I am satisfied HSBC ought fairly and reasonably to have intervened by contacting Mr A to ask some questions about the nature and purpose of the payment I've highlighted before agreeing to process it.

I don't see that HSBC contacted Mr A and therefore it was a missed opportunity to intervene.

<u>Would HSBC's intervention have made a difference and prevented Mr A's loss?</u>

If HSBC had fulfilled its duties by asking suitably probing questions, there is no reason to doubt that Mr A would have explained what he was doing and that the purpose of the payment was to invest.

In such circumstances, whilst HSBC had no duty to protect him from a bad bargain or give investment advice, it should have asked Mr A some further questions to ascertain whether he was likely to be at risk of financial harm from fraud. I've thought carefully about the sorts of questions HSBC should've asked, bearing in mind the features of investment scams at that time – particularly crypto scams.

I think HSBC could have asked how Mr A came across the investment, whether a third party was assisting him, whether he'd been able to withdraw any funds and whether he'd carried out any research. At the time of Mr A's seventh payment, investment scams carried common features. For example, these included rates of return which were too good to be true, receiving the opportunity to invest via an unsolicited offer and/or cold call (this could be contact via social media) and fraudsters applying pressure to their victims to invest quickly.

I think Mr A would've likely explained that he was searching for investment opportunities and had made contact with C via a legitimate employment-focussed social media website. He'd have also likely explained that he'd carried out sufficient research and was persuaded by what he saw. Mr A would've also likely explained that a third party was assisting him but he had control of his trades and could manually close them himself. I think he'd have also explained his returns would be between 4% to 5%. And with regards to withdrawals, he'd have likely explained that he understood he could withdraw at anytime but didn't plan to yet. I think Mr A would've likely explained that he was happy with his investment and he planned to invest further funds.

Against this backdrop, I think HSBC would've likely conducted its own checks into C and would've likely found no adverse information. As Mr A has explained, the regulator warning published about C did not appear on a search engine result until some time after he'd made his payments and there were no FCA warnings published about them. I've also not seen any warnings published about C on the International Organization of Securities Commissions Investor Alerts Portal nor have I seen negative customer reviews at the material time. Mr A wasn't under pressure to make payments as he was making his deposits voluntarily on the basis that he was happy with the performance of the investment.

I don't think HSBC would've likely concluded with any degree of certainty that Mr A was most likely falling victim to a scam as; he had control of his trading account; he wasn't promised returns that were too good to be true; he wasn't under pressure to pay; and hadn't had any difficulties with withdrawals. But I do think some of his explanation would've likely caused HSBC some concern and prompted it into providing a meaningful warning around investment scams – specifically crypto scams and how they operate. I think HSBC could have explained the risks with crypto trading particularly if the third party he's dealing with is unregulated (which they appeared to be at the time), that trading platforms can appear legitimate but can be fake and can make it seem like consumers have large profits. I think HSBC could have explained that if Mr A is asked to pay money to release money this could indicate a scam as customers often face problems when they try to withdraw funds. I think HSBC could have also explained that scammers can advertise on social media platforms. I don't think Mr A would've been concerned based on the above warning as he appeared to be bought into the scam and hadn't yet faced problems with withdrawals. I also don't think any further payments made by Mr A to B after payment seven would've caused HSBC to reasonably suspect that he could be falling victim to a scam. Whilst the total amount he paid to B after payment seven on particular days were slightly increased, the frequency of his payments were sporadic. I therefore don't think HSBC had any grounds to intervene in any further payments Mr A made to B.

I've also taken Mr A's personal circumstances into account but I don't think HSBC would've had cause to suspect that Mr A could be vulnerable. He didn't disclose to his consultant that he'd stopped taking his medication and hadn't previously notified HSBC of his personal circumstances. I therefore don't think it's likely Mr A would've disclosed information about his mental health to HSBC at the time of any hypothetical intervention. Mr A's letter from his consultant states there's no concern that Mr A 'lacks capacity' and so I don't think HSBC should've drawn any reasonable conclusions that Mr A was unable to make his own financial decisions – even if they were high risk.

Part of my consideration includes that Mr A was so bought into the scam that he borrowed £300,000 by way of a business loan to fund further payments to it via another banking provider (which has been referred to this service as a separate complaint). That doesn't indicate to me that Mr A had any concerns with C. In my judgement and based on what I've seen, it would have taken something particularly credible to dissuade him from investing. I don't think that anything credibly tangible existed at the trigger point I think HSBC ought to have reasonably intervened. I therefore don't think there would have been anything HSBC could have reasonably said to change Mr A's mind about investing.

I finally have to highlight that it's difficult to find Mr A's testimony particularly credible. He says he didn't try to withdraw until November 2021 but some of the limited email communication between Mr A and the scammer discusses requests for tax payments or fees required from C around the end of August 2021, September 2021 and October 2021. With various certificates of his 'winnings' presented to him in September, October and November 2021, with requests for him to pay more. Mr A also says that he realised C were scammers shortly after his withdrawal request didn't materialise and he seized contact with them after their website disappeared (December 2021). Yet he's provided email communication with the scammer in June 2022 and that communication doesn't indicate that Mr A had concerns that C were scammers. Therefore, I'm not entirely satisfied we have a picture of what truly happened. But in any event, I don't think there's anything to support that Mr A had any concerns with his investment until after he sent all his payments from his HSBC account.

In other words, I am satisfied a warning from HSBC probably would have made no difference to Mr A. Any failings by HSBC were not the dominant, effective cause of his losses; they were just part of the background history or occasion that led up to them.

In light of my conclusions above on whether a warning would have made a difference, it is unnecessary for me to go on to consider whether Mr A himself was partly to blame for what happened (contributory negligence). Indeed, I have already concluded that he was responsible for his own investment decisions, and that such choices were the proximate cause of his losses.

Responses to my provisional decision

HSBC responded to my provisional decision and confirmed it had nothing to add.
Mr A responded to my provisional decision and said in summary:

- There was a clear and obvious fraud pattern. He agrees that the 7th payment should've been stopped.
- It is unfair to assume that he would not have listened to the bank at a time of the intervention payment. I indicate several scam hallmarks in my decision, however, seem to place a greater onus on him being 'invested' in the scam. Had the bank probed him, they could have prompted him to arrive in a bank and discuss the payments in person. This could have led to the bank enacting Banking protocol at an early point during the scam. Payment 7 took place ahead of him sending over £300,000. Therefore he would not have been as invested in the scam as I ascertain he had been. Bank staff are trained to spot hallmarks and it is rare that they check websites when having such calls with customers. A scam is usually detected before a call handler checks such websites due to hallmarks such as the deposit to withdrawal ratio. Simply looking at the scam company's website would have revealed to the call handler/branch adviser that something was untoward. This is what they are trained to do. Likewise I have further used scam hallmarks in declaring why he would've believed the scam was genuine; he could see the trades on a live platform, and he had a trusting rapport with the scammer. The onus is placed on the bank here to detect this and advise the client accordingly.

- His medical evidence is being used against him. It is clear that he was vulnerable at the time. Our service asks for evidence to back this up, which has been provided. It has never been put forward that he lacked capacity. His depression affected his decision making at the time of the scam – which is clear considering how out of character it was for him to invest the funds he did.

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 Mr A's complaint.

For the reasons I've explained in my provisional decision (which forms part of this final decision), I think it would have taken something particularly credible to convince Mr A that he'd likely fallen victim to a scam. At the time of his seventh payment, there was no credible adverse information about C and Mr A also didn't have any concerns with C at the time of this payment.

I still don't think HSBC would've likely concluded with any degree of certainty that Mr A was most likely falling victim to a scam as; he had control of his trading account; he wasn't promised returns that were too good to be true; he wasn't under pressure to pay; and hadn't had any difficulties with withdrawals. Upon receiving this information, I don't think HSBC would have reasonably been concerned that Mr A was most likely falling victim to a scam and so I don't think it would have reasonably required him to attend a branch for further discussions. But I do think some of his explanation would've likely caused HSBC some concern and prompted it into providing a meaningful warning around investment scams – specifically crypto scams and how they operate. I think HSBC could have explained the risks with crypto trading particularly if the third party he's dealing with is unregulated (which C appeared to be at the time), that trading platforms can appear legitimate but can be fake and can make it seem like consumers have large profits. I think HSBC could have explained that if Mr A is asked to pay money to release money this could indicate a scam as customers often face problems when they try to withdraw funds. I think HSBC could have also explained that scammers can advertise on social media platforms.

I also explained that Mr A's inconsistent testimony and lack of supporting evidence has been factored into my decision.

Taking everything into account, I'm still not persuaded a meaningful warning into crypto investment scams would've stopped Mr A in his tracks. I think he believed what he was doing was a real investment opportunity (particularly given the substantial sums he went onto invest with C). He didn't have any concerns with C and I think in the absence of something more concrete – like a regulator warning for example, I don't think a meaningful warning from HSBC alone would have caused him to do anything differently.

I do empathise with the personal circumstances Mr A has told us about and I accept it must have been a very difficult time for him, I'm pleased he's now receiving the support he needs. I don't agree that my provisional decision used Mr A's medical evidence against him. In Mr A's complaint letter he explained he was in a 'vulnerable position' and 'more susceptible to the scammer's manipulative ways'. He also said he stopped taking his medication 'unbeknownst to his psychiatrist at the time'. And that his 'decision-making capabilities were altered at the time of the scam, and we hope that you will account for this when considering the complaint'. I therefore, took this information into account when arriving at my decision as requested by Mr A. In my judgement, I don't think HSBC would've had cause to suspect that

Mr A could be vulnerable as I don't think his personal circumstances would've come up during the course of any intervention conversation (for the reasons explained in my provisional decision). I also don't think HSBC should've drawn any reasonable conclusions at the time of an intervention that Mr A was unable to make his own financial decisions – even if they were high risk ones.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A and Mr A to accept or reject my decision before 28 January 2024.

Dolores Njemanze
Ombudsman