

The complaint

Mr and Mrs P complain that HSBC UK Bank Plc, trading as first direct, won't refund money they lost when they were victims of a scam.

What happened

The background to this complaint is well known to both parties and so I'll only refer to some key events here.

Mr P transferred two payments of £10,000 from a joint account he held with Mrs P, on 12 April 2017 and 11 September 2018, to a firm I'll refer to as 'F'. The funds were to be invested in five-year bonds held in Mrs P's name. Mr and Mrs P received interest payments from the bonds but they stopped in April 2019. No further payments were made to Mr and Mrs P and F subsequently went into liquidation in March 2022.

Mr P complained to first direct in December 2022 saying these payments were made as a result of being a victim of sophisticated Authorised Push Payment (APP) fraud. He said he didn't recall being questioned about these payments, nor did he receive any warning that it might be fraud. And so, Mr P said first direct's failure to intervene and warn him the payment(s) might be fraudulent was in contravention of BSI PAS 17271:2017 and, also, demonstrated a failure to observe FCA Principles 2 and 6. Mr P added that he and his wife took care to investigate the investment opportunity as far as they reasonably could before making the payments. And so, he requested reimbursement for the loss they'd incurred from the scam.

First direct didn't uphold the complaint. They explained they couldn't agree Mr and Mrs P had been the victim of an APP scam as they'd received returns from F – who were listed on Companies House prior to being put in administration. Because of this, first direct felt it most likely that this was an investment that had gone wrong and so it was a civil dispute. They advised Mr and Mrs P to contact the administrator, the Citizens Advice Bureau or take legal advice to try and recover their funds. first direct further added that they couldn't raise a claim under the Contingent Reimbursement Model (CRM).

Mr and Mrs P referred their complaint to the Financial Ombudsman Service. They explained that, while they did receive some investment returns, they believed they'd fallen victim to a Ponzi scheme – and so the returns weren't from profits but money from other investors. And they set out why F was fraudulent, rather than a failed investment, including referencing statements made by the administrators.

Our Investigator considered the complaint but she didn't think first direct had to do anything further. She said she couldn't say with certainty whether F was a scam – although she acknowledged that Mr P discovering the opportunity from a cold call suggested it might be. And she understood why Mr and Mrs P may have believed the opportunity was genuine given the literature provided by F appeared legitimate, as well as initially receiving investment returns. But, in any event, she didn't think first direct could've reasonably prevented Mr and Mrs P's losses. This is because, beyond providing an online warning when the payments were made, she didn't think the payments were unusual enough for first direct to have identified them as suspicious – thereby giving them sufficient reason to think Mr and Mrs P were at risk of financial harm from fraud. And so, she wouldn't have expected first

direct to have carried out further checks – such as contacting Mr and Mrs P – before processing the payments.

Mr and Mrs P disagreed and so the matter has been passed to me to decide.

At which point, I think I should note that I'm aware Mr and Mrs P requested additional time to provide further evidence and representations for the Ombudsman's consideration. Their reason for the request was because they, along with others, have engaged with a specialist legal firm and are expecting a barrister's opinion on the matter which they feel should be taken into consideration before a final decision is reached. And at the time of making the request, they didn't know when the legal review would be completed.

Our Investigator declined Mr and Mrs P's request but explained that the barrister's opinion – or any other evidence – could be submitted whilst the case was awaiting an Ombudsman's review. I've given further thought to Mr and Mrs P's request but having done so, I'm satisfied I have enough information to proceed with making my final decision on their complaint.

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.

I'm sorry Mr and Mrs P have lost a significant sum of money and I don't underestimate the impact this has had on them. I'm aware Mr and Mrs P have provided a lot of information for my consideration in support of their complaint – particularly in respect of evidencing that F was acting fraudulently. I've given careful consideration to all the evidence provided. And so, I'd like to reassure Mr and Mrs P that if I don't mention a particular point, it's not because I haven't considered it, but I've focussed instead on what I believe to be important to the outcome of this complaint. Having done so, and while I know this won't be the outcome Mr and Mrs P are hoping for, I don't think first direct has acted unfairly by not refunding their loss for similar reasons to our Investigator.

An area of contention here is whether Mr and Mrs P have been the victims of a scam or, as first direct believe, the matter is a civil dispute as their investment with F simply went wrong. But I don't need to make a finding as to whether Mr and Mrs P were victims of a scam, and I'm not going to. This is because, even if they were, I wouldn't be reaching a different outcome on their complaint. If this wasn't a scam, but rather a bad investment, then there wouldn't have been any need for first direct to intervene or delay processing genuine payments. And even if I were to hypothetically accept Mr and Mrs P were the victims of a scam, I don't think first direct are responsible for the loss they've suffered. I'll explain why.

I've thought about the CRM code which can offer a potential means of obtaining a refund following APP scams. But the CRM code didn't come into effect until 28 May 2019 and doesn't apply retrospectively. This means, as Mr and Mrs P's payments were made before this, they're not covered under the CRM code. I've therefore considered whether first direct should reimburse Mr and Mrs P under any of their other obligations

In broad terms, the starting position in law is that a bank is expected to process payments and withdrawals that their customer authorises them to make. It isn't disputed that Mr P knowingly made the payments from the first direct account and so, I'm satisfied he authorised them. Therefore, under the Payment Services Regulations and the terms of their account, first direct are expected to process the payments and Mr and Mrs P are presumed liable for the loss in the first instance.

I have however taken into account regulatory rules and guidance, relevant codes of practice and good industry practice. This includes, but isn't limited to:

- The British Standards Institute code of practice PAS 17271.

- FCA Principles for Businesses 2 and 6, and SYSC 3.2.6R.
- The FSA's (the predecessor to the FCA) thematic review paper of 2012, 'Bank's defences against investment fraud – Detecting perpetrators and protecting victims'.

I'm therefore satisfied that first direct ought to have been monitoring accounts to counter various risks including preventing fraud and scams. To do this, first direct should've had systems in place to identify unusual transactions, or other signs, that its customers were at risk of fraud. And carried out additional checks before processing a payment or, declined the payment altogether, to help protect customers from the possibility of financial harm from fraud.

Here, I'm aware that first direct provided Mr P with an online warning when he made the payments. It said:

"Take care when sending money

This could be a scam

Fraudsters can offer you what appears to be a genuine opportunity with high returns. They can try to pressure you to invest your savings or transfer your current pension to a new scheme.

- *Take time to talk to someone you trust who is not involved with the investment.*
- *You must independently research who you're sending money to.*
- *Company names can be cloned. It's vital you contact the company on an independently verified number.*
- *Check the company is genuine and authorised by the Financial Conduct Authority..."*

The warning went on to explain that by choosing to continue with the payment, Mr P was agreeing he'd read it and was happy to proceed. And that he accepted first direct may not be able to recover the money if it's sent to a fraudster's account.

Although Mr P can't recall receiving any online warning, I think first direct acted reasonably by providing it - highlighting the risk of it being a scam and setting out some of the steps he could take to protect himself. It seems Mr P continued to make the payments despite this warning. That said, I've also considered whether first direct should've done more than this. I've therefore looked at whether the payment instructions given by Mr P to first direct were unusual enough, in relation to Mr and Mrs P's typical account activity, to have expected first direct to have identified they were at risk of financial harm from fraud – thereby warranting further intervention such as a conversation with Mr P before releasing the payment(s).

Having reviewed Mr and Mrs P's account statements, I've seen that they made a legitimate £10,000 transaction the day prior to the first disputed payment. And payments of several thousand pounds weren't uncommon, nor were investment related transactions unusual. Because of this and taking into consideration that there is a balance for first direct to find between allowing customers to be able to use their account and questioning transactions to confirm they're legitimate, I don't think the two £10,000 payments to F were so unusual or out of character to have given first direct sufficient reason to believe Mr and Mrs P were at risk of financial harm from fraud. It follows that I wouldn't have expected first direct to have intervened – beyond the online warning they provided - before processing them.

I'm sorry to hear Mr and Mrs P have suffered a significant financial loss as a result of what happened. But it would only be fair for me to direct first direct to refund their loss if I thought the bank was responsible – and I'm not persuaded that this was the case. For the above reasons, I think first direct has acted fairly and so I'm not going to tell them to do anything further.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs P to accept or reject my decision before 27 November 2023.

Daniel O'Dell
Ombudsman