

The complaint

Mr S complains that HSBC UK Bank Plc won't reimburse him with the money he sent to one of its customer's accounts as the result of a scam.

What happened

The detailed background to this complaint is well known to both parties. So, I'll only provide a brief overview of some of the key events here. In 2021 Mr S was looking to make an investment. He decided to invest with a firm I'll refer to as 'W' who he believed were offering a six-month fixed term bond paying 4.85% per annum interest. It was suggested that W were working in collaboration with another regulated firm 'F'. As a result of this, in September 2021 he instructed a payment for €500,000 from his own bank 'I' (which is based outside the UK) to the account details provided by W. This related to an account held with HSBC in the UK. The following month Mr S made another payment towards what he believed to be a similar investment with W (also from his account with I) for another €500,000 to the same HSBC account. The two payments credited the HSBC account as £423,629.01 on 28 September 2021 and £420,964.06 on 14 October 2021.

Soon after his second payment Mr S grew concerned he may have been scammed. This was because he didn't receive any confirmations in relation to the payment and W's website disappeared. He says he reported this to I and asked them to recall his latest payment. He also contacted HSBC directly and asked that they return his funds. HSBC said they couldn't provide a refund and referred Mr S back to I. Mr S later complained to HSBC that it had not done enough to prevent his loss. One of our Investigators considered the complaint and ultimately recommended it should be upheld. Subject to our service's award limits, he recommended that HSBC should pay around £820,000 plus 8% simple interest. Mr S accepted this outcome, but HSBC didn't.

As agreement couldn't be found, the complaint was passed to me to decide. In October 2023 I issued a provisional decision in which I said:

"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'm intending to reach a different outcome to that of our Investigator. So, I wanted to issue this provisional decision to give everyone a further opportunity to comment before finalising my decision.

I'm satisfied that HSBC correctly followed its account opening process for the account that received money from Mr S. The account was opened by an existing HSBC customer with whom it had a relationship dating back to the mid 1990's. I don't think there was anything at that stage that would have indicated that the account might later go on to be used in connection with a fraud or scam. So, I don't think there was a failure by HSBC whilst opening the account which resulted in Mr S' loss.

The account that received the funds was a sterling-based account and the initial €500,000 credited the account as £423,629.01 on 28 September 2021. HSBC have obligations to be

alert to potential fraud, scams and the misappropriation of funds. They are also required to have systems and controls in place in relation to compliance, financial crime and money laundering. In particular the Financial Conduct Authority's (FCA) Systems and Controls Sourcebook (SYSC) includes that "A firm must take reasonable care to establish and maintain effective systems and controls for compliance with the applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime." (SYSC 3.2.6R).

Further SYSC guidance includes that "A firm should ensure that systems and controls include:... (4) appropriate measures to ensure that money laundering risk is taken into account in it's day-to-day operation." (SYSC 3.2.6G).

In it's March 2016 paper "Financial Crime: a Guide for Firms" the FCA set out that "A firm must conduct ongoing monitoring of its business relationships on a risk-sensitive basis. Ongoing monitoring means scrutinising transactions to ensure that they are consistent with what the firm knows about the customer, and taking steps to ensure that the firm's knowledge about the business relationship remains current."

Elsewhere the same paper says "The material in the Guide does not form part of the Handbook, but it does contain guidance on Handbook rules and principles..." I'm not suggesting that its content should be taken as a checklist, but it includes examples and suggestions of good industry practice (something I'm entitled to take into account) and remains a valid consideration for this complaint.

HSBC say from a legal perspective they owe no duty of care to a third party (like Mr S) with whom they have no contractual relationship. Therefore they do not have to protect them from the risks of fraud. I take on board the point HSBC makes, but whilst I must take the law into consideration, my role as an Ombudsman is to ultimately decide a complaint based on what I think is fair and reasonable in all the circumstances. And despite the lack of a contractual relationship with or a legal duty of care to Mr S, if HSBC has failed against its regulatory obligations and that can reasonably be said to have caused the loss to Mr S, I think it is fair and reasonable to direct that that loss be reimbursed.

I'm aware that HSBC have highlighted the timescales set out in the Payment Services Regulations 2017 (PSRs). Specifically, that payments received need to be credited to an account promptly. It is often the case that there are competing demands or obligations in cases of fraud or scams. HSBC is correct to say that it is expected to follow instructions provided by its customers and to promptly make available funds paid into an account (in line with the PSRs). But there are also obligations to prevent fraud, scams, and the misappropriation of funds. And it is the friction between such competing obligations where the crux of the matter is found.

The obligations to process payments that HSBC have described are not absolute. And I don't agree that the existing regulatory or legal position prevents HSBC from taking action to prevent money from being paid away from an account in certain circumstances. This would include where HSBC have grounds to suspect that paying away funds would be furthering financial crime.

This is reflected in HSBC's own account terms. Section 18 of which refers to when HSBC may not be able to make a payment and includes:

"if we reasonably consider doing so may... involve us or you breaking a law, regulation, court order, code or other duty, requirement or obligation that applies to you, us or another HSBC Group Company...[or] someone else may have a claim over the money."

The SYSC guidance I've referenced above is about systems and processes for the monitoring of accounts. But that monitoring has a purpose, and that is to be alert to and to react to various risks including AML concerns as well as fraud, scams and the misappropriation of funds.

I think it's broadly accepted that large payments present an increased risk of money laundering. And in the circumstances here, HSBC had been told by its customer that they anticipated receiving around £1,000,000 yearly in the account with around £250,000 of this coming from outside the UK. The incoming payment from Mr S represented almost 50% of the total expected annual amount in a single transaction. And was significantly more than what was expected for international payments. It is also a very significant amount of money, the like of which hadn't been received in the account previously.

It isn't the case here where the receipt of such sums (or anything approaching that amount) was regular or commonplace for the account. For clarity, I'm not suggesting HSBC ought to hold every payment of that value. But in the circumstances of this complaint and the particular account in question, the arrival of Mr S' money represented a risk. And I think HSBC were entitled to hold that payment whilst they looked more closely.

So whilst the initial concern would have been due to potential AML concerns, I think it would then have become apparent that the accountholder may not have been the intended beneficiary of the payment – which then ought to have engaged HSBC's fraud measures. I say this because the evidence Mr S has provided suggests that he was the intended beneficiary named on the payment instruction. The details for where to send the payment provided by the scammer included that Mr S should use his own name as the recipient. I think its most likely there was a mismatch between the beneficiary information provided with the payment instruction and the named recipient accountholder. This ought to have been an immediate red flag. An incoming payment with a beneficiary name mismatch is something commonly seen with the movement of the proceeds of a fraud or scam.

Beyond this, other payments received around the same time into the same account, were also later reported as having been made as a result of fraud. These include but aren't limited to over £80,000 on 28 September 2021 and over £33,500 on 4 October 2021. On balance, given its likely these were as a result of the same or a similar type of scam, I think its more likely than not that there would have similarly been mismatches between the named beneficiary on the payment instruction and the recipient accountholder. This would have added to the overall picture that something was likely amiss with this account.

I think HSBC ought to have asked to see evidence that its customer was the intended beneficiary of the incoming €500,000 payment and be satisfied of this, before releasing any of those funds.

There is evidence to show that HSBC later had cause to contact its customer about another incoming payment. And at that time, it wasn't satisfied with the explanation the customer gave regarding entitlement to the funds. I acknowledge that this was a sophisticated international scam. And I've considered HSBC's point that the information it had to suggest impropriety by its accountholder was stronger at the point those conversations took place. But given I can't know with 100% certainty what the accountholder would have said if challenged about Mr S' first incoming payment, I have to make a finding on the balance of probability. And I think the best evidence I have of what likely would have happened, is what did happen when the other payment was questioned.

The accountholder tried to provide an explanation and evidence, which didn't fit in with what HSBC knew about its customer and wasn't accepted. And overall, I think the same would have happened, just at an earlier point. This is particularly the case as the account continued

to receive significant payments soon after Mr S' first one, which as I've mentioned above, most likely had beneficiary name mismatches.

HSBC have suggested that it likely would have contacted I who in turn would have spoken to Mr S. And it's likely that due to the sophistication of the scam, and how taken in he'd been he may well have confirmed the payment to have been genuine. I've considered this, but I think it's most likely that had I asked Mr S about either of his payments he would have truthfully reported what he believed to be the case at the time. Specifically that these were payments to invest in bonds with a regulated firm. And when that would have been reported back to HSBC, it would have given further strong evidence to support the case that their accountholder was involved in a fraud or scam. I say this as providing investments didn't match what HSBC knew about their customer from the information taken at account opening.

Had the account been frozen following the first payment (as I'm intending to conclude it should have been), I think all of Mr S' first payment would have remained available for recovery. It follows that the second payment would then also have arrived into a blocked account and would have similarly been recoverable or would have not been credited and bounced back to the sender. So, but for HSBC's inaction, all of Mr S' loss likely would have been prevented.

It's clear Mr S was looking to invest the funds he lost to the scam, but it's difficult to say exactly what he would have gone on to invest in, had his money been recovered. In line with our usual approach to situations like this, I also think 8% simple interest (yearly) should be added to my proposed award. I'll deal with the exact details of this below.

However, HSBC have suggested that Mr S should bear some responsibility for his loss due to contributory negligence. They have also questioned whether I did all they should when Mr S instructed his payments. I have no jurisdiction to comment on the actions of I. And I've seen evidence from Mr S' local Ombudsman scheme which indicates no action was taken against them. So I'm satisfied Mr S has an outstanding loss of the full amount he sent. But in the circumstances here, I'm minded to agree with HSBC about contributory negligence. Mr S' testimony is that he didn't regularly instruct payments of the value of those relevant to this complaint – and this is supported by the statements of his account with I that he's provided. I also don't think it's unreasonable to expect more of a consumer when they are making payments of such a significant value. I think any reasonable person would be very cautious when sending €500,000 from an account.

In an email to our service in May 2023 Mr S said that he checked the reference number of F (a partner of W) which was authorised with the FCA. However, the FCA website includes a warning about the fact that F was being impersonated by scammers. This is prominently displayed when you search for F on their website and it was first published in July 2020, long before Mr S instructed the first payment. The FCA website also links to information on how to protect yourself from a 'cloned investment' firm scam including contacting the firm directly using information from the FCA's register. Beyond this, there was also a broadly similar warning about W on the FCA's website which was first published in August 2021. Again, this is prior to Mr S' first payment.

Given Mr S has said he checked the FCA website, I think it's most likely he would have seen at least one of these warnings. But he failed to heed the advice on the website or to take further steps to mitigate the risks that the payments he was about to instruct might be as a result of a scam. In doing so, I think he too was partially responsible for his loss. As such, I intend to make a reduction in my proposed award of 50% to fairly reflect this."

I then went on to explain the award and recommendation I intended to make in my final decision. This included the addition of 8% simple interest to the sums awarded / recommended.

Mr S responded and highlighted some of the checks he'd made prior to making his payments, but ultimately he said he accepted my provisional decision. HSBC too responded and part of that response questioned my intended interest award. As a result of this I asked Mr S some further questions and was ultimately persuaded to slightly amend my decision. As a result of this I wrote to both parties giving them a further opportunity to comment on the change. I said:

"Following on from my provisional decision HSBC raised some valid points with regard to the proposed interest award. I asked Mr S some further questions. He explained that but for the scam he likely would have continued to invest in 'secure fixed time deposits'. As such, I'm no longer persuaded that 8% simple is an appropriate interest award.

The 'scam' investments were for a fixed term with a guaranteed return. And that in combination with Mr S' stated intentions lead me to conclude that he wouldn't have wanted to put his funds into investments with any meaningful level of risk. And in these circumstances, I think it is appropriate to look to the rates published by the Bank of England showing the average return from one-year fixed rate bonds. These are the average rates that banks and building societies are advertising for fixed term, fixed rate deposit accounts. I'm not saying this is exactly how Mr S would have invested his money, but it represents the sort of return he would have achieved with no/little risk to his money. Details of the rates available each month for the relevant years can be found on this [link](#).

For clarity, my proposed award / recommendation is now:

Putting Things Right

Decision and award: *The total of the two payments received from Mr S in the HSBC account is £844,593.07. I think fair compensation is half this amount, £422,296.53, taking into account a reduction for contributory negligence. I also think that fair compensation would be this amount being paid in such a way that Mr S receives an equivalent amount of Euros, using the exchange rate at the time, had the £422,296.53 been returned on 18 November 2021. This is to reflect that it's most likely the return of funds would have taken a few weeks to arrange between the banks. I appreciate this isn't precise, but I believe this provides a practical and fair and reasonable approach, given its impossible to know with certainty the exact point at which the funds would have been returned.*

My decision is that HSBC UK Bank Plc should pay Mr S £355,000. With regard to interest, HSBC should calculate the return Mr S would have received had he invested £355,000 on 18 November 2021 for 12 months using the rate available from the Bank of England's average return from one-year fixed rate bonds at that time. This interest should be compounded and calculated again each year between the 18 November 2021 and the date of settlement, using the applicable interest rate for each further 12 month investment.

Recommendation: *I think that fair compensation is more than £355,000, so I recommend that HSBC UK Bank Plc pays Mr S the balance. I would recommend this is paid in such a way that Mr S receives an equivalent amount in Euros, taking into account the exchange rate at the time, had the funds been returned on 18 November 2021. I also recommend that interest be added to the balance (above our award limit) to be calculated in the same way I've set out above in my award between 18 November 2021 and the date of settlement.*

This recommendation is not part of my determination or award. HSBC UK Bank Plc doesn't

have to do what I recommend. It's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S may wish to seek independent legal advice before deciding whether to accept my final decision."

HSBC responded and said they had nothing further to add in relation to my amended redress. Mr S responded and disagreed with the amendment to the interest award. As both parties have now had a further opportunity to comment I can go ahead with my final decision.

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.

HSBC's response to my provisional decision said they still disagreed but had no further comments to add beyond those I've addressed above about interest. Mr S accepted my provisional decision and said that he didn't notice any warnings on the FCA website when conducting his checks prior to making the payments. But for the reasons I've already explained, I think it's more likely than not that he would have seen the warnings at the time and I'm not persuaded to deviate from the core outcome explained in my provisional decision.

Mr S also made further comments that he thinks 8% interest should still be applied, pointing out that this is commonly the interest rate used in court and arbitration. He says that he wouldn't have reinvested the full amount into fixed rate bonds and that he likely would have diversified this between ETF's for the long term and daily money in the short term. I've considered this, but when I previously asked Mr S what he likely would have done, he replied that *"Probably we would have invested it again for a limited period (secure fixed time deposit)." I accept what Mr S says about this being a hypothetical situation. And I can't know with absolute certainty what he would have done. In these circumstances I must make my decision on the balance of probabilities, that being what I think is most likely, taking account of the available evidence and arguments. So whilst I can understand why Mr S is now saying something different, I'm more persuaded by the answer he initially gave. And for the reasons I've explained, I maintain that the interest award as set out above is fair and reasonable in the circumstances of this complaint.*

My final decision

For the reasons outlined above, my final decision is that I uphold this complaint. HSBC UK Bank Plc must take the steps outlined at 'Putting things Right' above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 16 January 2024.

Richard Annandale
Ombudsman