

The complaint

Mr and Mrs N complain that HSBC UK Bank Plc won't refund money they lost as a result of a scam.

Mr and Mrs N are represented by a firm that I'll refer to as 'R'.

What happened

I sent my provisional decision to both parties on 5 October 2023. I said:

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

In 2022 Mr and Mrs N were the victims of a crypto scam. Mr N came across an investment advertisement on a social media website that was, supposedly, endorsed by Elon Musk. Intrigued by the investment opportunity, Mr N provided his details by completing a form and was later contacted by a firm I'll refer to as 'E' (the scammers).

Mr N has said he spoke with E, learning more about their trading history and allowing them to understand his investment ambitions. He was also shown a video of another client who'd started investing small amounts and received good returns. Because of this, Mr N likewise chose to invest a small amount to begin with – seeing profits and shown how to make withdrawals from E's trading platform. Feeling reassured by this, Mr N decided to invest further. He made four international payments – in Euros - from Mr and Mrs N's joint HSBC bank account to legitimate crypto exchanges, to buy crypto, before sending it to E's trading platform. The relevant payments are:

Date	Type	Amount
24 June 2022	International payment	£30,027.43
12 July 2022	International payment	£15,470.85
14 July 2022	International payment	£41,033.97
25 July 2022	International payment	£41,055.35
Total:		£127,587.60

Mr N realised he'd been scammed when, at a family event, he spoke with his son who realised the investment didn't sound right.

R complained to HSBC, on behalf of Mr and Mrs N, in September 2022. In short, they said:

- Although HSBC did speak to Mr N about one of the later payments, they ought to have questioned him about the first payment for £30,027.43. This is because the payment(s) was out of character based on Mr and Mrs N's typical account usage.*

- *When HSBC did speak with Mr N, they only asked very basic information – such as whether he had checked if E was regulated by the Financial Conduct Authority (FCA), or if he'd seen the terms and conditions of the investment contract. Whereas the bank ought to have delved into how Mr N discovered the investment opportunity, which would've unearthed the scam as HSBC, being fraud experts, are aware false media posts endorsed by celebrities are a known starting point for scams. HSBC would've also identified other warning signs, had they questioned Mr N appropriately, including that an unregulated broker was asking him to send money to crypto exchanges.*
- *Mr N was fully co-operative with HSBC, answering their questions truthfully and honestly.*
- *The payments were sent to crypto exchanges with the help of the scammers, using a remote desktop application.*
- *Mr N had little knowledge of crypto or how it worked, and so followed the instructions given to him.*
- *Crypto scams have been incredibly prevalent, and HSBC should've known how they worked as well as how common they are since 2018 – particularly from the point Action Fraud provided a warning about crypto scams. HSBC, therefore, should've had controls in place to protect customers by the time of the scam.*
- *Had HSBC intervened on the first payment, asking appropriating questions and given relevant warnings to Mr N, then the fraud could've been prevented. So, they wanted HSBC to refund Mr and Mrs N for their losses and pay 8% interest.*

HSBC didn't uphold the complaint. They said the payments weren't covered under the Contingent Reimbursement Model (CRM) code and so they wouldn't provide a refund. And they explained they offered fraud warnings when Mr N set up the initial payments and spoke with him, prompting him to stop the payment until he'd done further research. Mr N then called back to have the payment made – and he explained he thought E were a genuine company as he'd searched them online, looked at reviews and seen their terms and conditions. HSBC added that they'd notified the beneficiary banks of the allegation, asking them to return the funds.

The complaint was referred to the Financial Ombudsman but our Investigator didn't think HSBC had to do anything further. He thought HSBC should've contacted Mr N sooner but even if they did, he wasn't persuaded it would've made a difference. This is because, having listened to the calls that did take place, he was satisfied HSBC sufficiently warned Mr N about crypto scams and their prevalence. And that they recommended he carry out further checks, such as checking the FCA register and their cloned firms' page. Mr N however said he'd done his due diligence on E and he was satisfied they were legitimate.

R disagreed and so the matter has been passed to me to decide. In short, they've said:

- *HSBC didn't check the FCA register and, had they done so, they would've known E wasn't a legitimate firm.*
- *HSBC asked Mr N whether he was sure E were legitimate but, as a novice investigator, this wasn't sufficient. And Mr N recalls that HSBC didn't go through common red flags or ask in depth questions about E.*

- *Having listened to the calls, they don't think Mr N was properly warned or that HSBC's intervention was sufficient. This is because there weren't probing questions asked about the investment and it's clear Mr N wasn't knowledgeable. So, asking him if he felt the investment was legitimate isn't a question that would uncover fraud – as no normal person would willingly transfer money when they know it's a scam.*
- *Even though the customer raised red flags in the calls, HSBC skimmed over these with pre-decided questions. For example, despite Mr N saying he's moving money for an investment, HSBC focused on unrelated safe account questions instead of asking basic investment scam questions – such as:*
 - *Why have you chosen this company? To which Mr N would've explained it was partly because Elon Musk was endorsing it. This would've been a considerable red flag and HSBC should've stopped the payment explaining it is fraud.*
 - *Has anyone asked you to download a remote desktop application? To which Mr N would've confirmed yes, this had happened.*
- *HSBC also didn't ask for the firm's name and, even though Mr N explains he is sending money to his trading account, they don't ask any follow up questions about this. Instead, they skip to whether Mr N has received advice from friends but they don't ask basic questions about how he found the investment itself. If they had, Mr N would've told HSBC that he'd found them via a social media website which, again, would've been a clear red flag.*

What I've provisionally 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've thought about the CRM code which can offer a potential means of obtaining a refund following Authorised Push Payment (APP) scams like this one. But the CRM code only applies to payments made to an account held by another person, in sterling, between two UK based accounts. As the payments Mr N made were sent internationally, to an account he held in his own name, they're not covered under the CRM code. I've therefore considered whether HSBC should reimburse Mr and Mrs N under any of their other obligations.

In broad terms, the starting position in law is that a bank is expected to process payments their customer authorises them to make. Here, it isn't disputed that Mr N knowingly made the payments from his joint bank account held with Mrs N. I appreciate Mr N was tricked by the scammer as he thought it was a genuine investment opportunity. Nevertheless, I'm satisfied the payments were authorised by Mr N. So, under the Payment Services Regulations 2017 and the terms of the account, HSBC are expected to process the payments and Mr and Mrs N 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 HSBC ought to have been monitoring accounts to counter various risks including preventing fraud and scams. To do this, HSBC 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.

So, the starting point here is whether the instructions given by Mr N to HSBC were unusual enough - in relation to Mr and Mrs N’s typical account activity – to have expected HSBC to have identified he was at risk of financial harm from fraud.

Having reviewed Mr and Mrs N’s account statements, it was typically used for relatively low value day to day spending along with the occasional higher value transaction (of several thousand pounds). The first payment to a crypto exchange of £30,027.43 was, therefore, for significantly more than Mr and Mrs N typically spent on their account. Considering this, and that the payment was being sent to a new international payee, I think it ought to have been identified by HSBC as unusual. So, I think HSBC ought to have held the payment and contacted Mr N about it.

I’ve therefore thought about, had this happened, whether Mr and Mrs N’s loss could’ve been prevented. And, after giving this careful thought, I think that should’ve happened here. I’ll explain why.

When considering this, I’ve taken into account the telephone conversations between Mr N and HSBC on 13 and 14 July 2022 relating to the £41,033.97 transaction. This is because, I see no reason to think – had HSBC intervened earlier – that they would’ve handled it any differently. Having carefully listened to the calls, I don’t think HSBC did enough to identify whether Mr N was at risk of financial harm from fraud, or that they gave sufficient warnings or advice to Mr N to allow him to protect himself from the scam. This is because:

- Mr N explained the payment was for investing via a broker, E, but HSBC failed to question Mr N how he came across E and the investment opportunity. I think HSBC ought to have probed Mr N about the investment more than they did, particularly given the payments were made to a crypto exchange as they ought to have been aware of the prevalence of crypto scams at that time. Had this happened, I think Mr N would’ve explained he’d come across the investment opportunity on a social media website that was, supposedly, endorsed by Elon Musk. This would’ve been a significant red flag to HSBC as these are common features of crypto scams.*
- Mr N explained to HSBC that E opened his crypto account, and the money had to be sent via the crypto exchanges as it couldn’t be sent directly to his trading account. He also said he had no idea as to whether he could access his crypto wallet, as he didn’t know what that meant, but he could see the trading account balance on a ‘dashboard’. Again, these are extremely common features of crypto scams that ought to have been identified by HSBC and put them on notice that Mr N was likely making the payment as part of a scam.*
- Tailored and probing questioning, in light of Mr N telling HSBC that E opened his crypto account, would’ve also uncovered that he’d downloaded a remote*

desktop application so that E could assist him with crypto investing. This is another common feature of an investment scam as a legitimate investment firm wouldn't use a remote desktop application.

- Although HSBC did tell Mr N that crypto scams are rampant, they said it was difficult to identify between legitimate and fraudulent cases. As per above, I think HSBC could've easily identified this was a scam had they questioned Mr N appropriately about E and the investment opportunity.
- Mr N suggested, as way of verifying the legitimacy of E, that he compose an email to the two individuals he was dealing with so to clear things up. This was because he was keen not miss out on the investment opportunity but, he was concerned he hadn't done the sort of things HSBC were referring to which he had no knowledge of. So, he said he could provide a list of questions to E such as, does he have access to the crypto wallet? HSBC should've, however, explained to Mr N that trying to verify whether E was legitimate by contacting them wouldn't be an appropriate method of doing so – as a scammer would simply reassure their victim of their legitimacy.
- The advice/warnings given by HSBC were generic and aimed at general investment scams, rather than tailored to crypto. For example, given crypto investments are unregulated, directing Mr N to check whether E was regulated, with say the FCA, or listed as a cloned company on their website was unlikely going to uncover the firm wasn't legitimate. And there also wasn't a warning about E published by the FCA until March 2023.
- Although it wasn't unreasonable for HSBC to recommend Mr N obtain the terms and conditions from E, I don't think this would've given Mr N sufficient knowledge – without the advice of a qualified financial adviser – for him to establish if it was a genuine investment opportunity.
- The questions asked by HSBC weren't, at times, particularly relevant. For example, in the second call, even though they knew Mr N was sending the payment for investment purposes, they questioned whether he'd received any calls, texts or emails asking him to move money to a safe account.

Taking all of this into consideration, I'm not persuaded HSBC did enough to protect Mr N from the scam. I appreciate Mr N believed E were a legitimate firm as he'd search them online, read reviews and seen their terms and conditions. But I don't think HSBC should've allowed the payment to be processed because of this. Instead, HSBC ought to have satisfied themselves Mr N wasn't at risk of financial harm from fraud before processing the payment. And here, I think HSBC failed to identify and act on clear red flags which Mr N brought to their attention – as well those they didn't uncover due to a lack of appropriate probing about the payment.

Mr N was a novice investor who made it clear to HSBC that he didn't understand aspects of the investment, nor was he knowledgeable about the checks he could carry out to ensure it was legitimate. And so, as the financial experts, HSBC were best placed to warn him about the significant risks of making the payment to the crypto investment. I've no reason to think Mr N would've ignored such as advice, particularly as in the first call, he explains that he's done his due diligence to the point he knows how, but that he would also take any advice HSBC had to give.

It follows that, had HSBC intervened effectively by asking Mr N probing questions about E and the investment, they would've become aware he was very likely falling victim to a scam. And, accordingly, they should've warned Mr N as such. Considering Mr N's willingness to take advice from HSBC, I see no reason to think he wouldn't

have been receptive to such a warning. I therefore consider HSBC failed to protect Mr N, and his wife, from the loss they suffered.

I've also given thought about whether Mr and Mrs N should bear some responsibility by way of contributory negligence. Having done so, I don't think that would be fair here. This is because I consider they were victims of a sophisticated scam and I don't think Mr N acted in a way that could reasonably be considered to be negligent, thereby warranting a reduction in the award.

To put things right, I think HSBC should refund Mr and Mrs N £127,587.60 and apply 8% simple interest per year (calculated from the date of payment to the date of settlement).

I've also considered the impact of what's happened on Mr and Mrs N. And while I accept E, as the scammers, are primarily responsible for the distress and inconvenience Mr and Mrs N have suffered, I think HSBC could've reasonably prevented their loss. And so, to recognise the impact of this on Mr and Mrs N, I think it would be reasonable for HSBC to pay them £300."

Mr and Mrs N accepted the provisional decision but HSBC did not.

HSBC seemed to accept they could've done more to protect Mr and Mrs N from the scam but they didn't think a full refund was fair – or consistent with other decisions reached by the Financial Ombudsman. In short, and in relation to why they felt Mr and Mrs N should bear some responsibility for their loss, they said:

- Mr N told them on the 14 July 2022 call that he'd carried out online research. But, from their own online search, they found a review website which gave warnings that E could be a scam prior to the payments being made.
- They didn't think a reasonable person would invest over £120,000 following sight of an investment advertisement on a social media website. And, while Mr N has been unclear on the returns offered, they assume his conduct was influenced by 'too good be true' returns.
- There was information across the comments they made to him, as well as the digital warnings they provided when he made the payments, that ought to have caused Mr N to question the arrangement. They also advised Mr N to consult a financial advisor, which he failed to do.
- It's unclear why Mr N didn't consult a family member about the investment at an earlier stage.

HSBC also questioned the interest rate I intended to award for loss of use of money as they didn't think 8% was fair or reasonable – as a significant proportion of the payments were funded from savings' accounts, and so the interest rates for these accounts should be applied.

As part of considering HSBC's response to my provisional decision, I sought additional information from Mr and Mrs N via R. And they confirmed Mr N couldn't recall what information he found online, and therefore relied upon, as part of his due diligence of E. But that he did receive terms and conditions and reviewed the firm's website. And in response to my request for evidence of the interest rates applicable to the source of funds, Mr N said there wasn't any interest rate to be added.

I then wrote to both parties and explained, after further consideration, that I intended to reach a different outcome on Mr and Mrs N's complaint. I explained:

- I remained of the view that HSBC failed to protect Mr and Mrs N from the scam for the same reasons I set out in my provisional decision. But I thought there should be a 50% reduction in the award due to contributory negligence.
- I acknowledged HSBC's reference to the review website that indicated E could be a scam. But I didn't think one review website, with only a small number of negative reviews, would necessarily be enough to say Mr and Mrs N didn't undertake reasonable due diligence before investing – particularly given it didn't appear as a top result in my own historical internet search.
- But I'd thought what I would've considered reasonable due diligence here – including the amount invested, Mr N's lack of crypto experience/knowledge and the source of funds (which came from a business account and loans). And as Mr N was intrigued by the investment opportunity due it being endorsed by Elon Musk, I thought it would've been reasonable for Mr N to have undertaken some checks about this online before proceeding. Had he done so, and from my own historical internet search, he would likely have come across various websites referring to crypto scams and indicating deepfake videos of Elon Musk being used by illegitimate firms to promote crypto.
- This should've put Mr N on notice that there was a risk the investment could be a scam. Thereby prompting him to seek further advice before proceeding – as he eventually did when speaking with his son at a family event. If he'd done so, then I thought it was reasonable to assume Mr N would've similarly become aware it was a scam and not proceeded to make the payments.

Because of this, I thought HSBC should refund £63,793.80 and pay £300 compensation (as I remained of the view that compensation was appropriate given HSBC could've prevented the trouble and upset Mr and Mrs N experienced).

HSBC agreed but Mr and Mrs N did not. And R, on their behalf, said:

- It would be unfair to place any weight on the review website as it wasn't even on page one of the results of their historical internet search for E.
- They didn't think my reasoning that Mr and Mrs N ought to have researched the celebrity endorsement – which in turn would've led them to uncovering it was commonly associated with this type of scam - was fair. Or that it was consistent with other decisions the Financial Ombudsman had reached on similar complaints. And they highlighted other cases whereby they considered reductions for contributory negligence hadn't been applied purely on the basis it was endorsed by a celebrity.
- Instead, the Financial Ombudsman put weight on the failure of the bank – as a celebrity endorsement is an obvious red flag to a fraud expert whereby it wouldn't be for an ordinary person like their client.

I replied to R and, in short, said:

- I accept the review website may have been missed by Mr and Mrs N as it doesn't appear to have been a highly prominent internet search result at the time. So, I didn't think this alone would be enough to say Mr and Mrs N are partly responsible for their loss.

- But I'd given further thought to whether a reduction in the award due to contributory negligence would be fair in line of R's points around 'celebrity endorsements'. And I noted R's reference to other complaints which had been decided by the Financial Ombudsman that they considered support their position. But I explained I would be considering the specific circumstances of Mr and Mrs N's complaint and therefore only commenting on that, and not the other complaints.
- Given Mr and Mrs N invested a significant amount of money with E, over £125,000, I think it's reasonable to have expected them to have carried out due diligence before proceeding – particularly as they were inexperienced with crypto. And, beyond receiving terms and conditions and reviewing E's website, Mr N can't recall what other information he relied upon.
- At the very least, I would've expected Mr N to have carried out an internet search. And although there may have been very little negative information about E, from my own historical internet search (as well as the search shared by R), there was likewise little – if any – information indicating E was a genuine firm either. In the absence of this, I think Mr and Mrs N ought to have been concerned about E's legitimacy.
- I therefore consider, given Mr N was intrigued by the investment opportunity due it being endorsed by Elon Musk, it would've been reasonable for him to have researched this further online too – which, as I've said, would've led to Mr N finding various websites referring to crypto scams and indicating deepfake videos of Elon Musk being used by illegitimate firms to promote crypto.
- I also thought, given the amounts involved, that it would've been reasonable for Mr and Mrs N to have sought further advice before investing with E – whether prompted by the internet search or not. And they eventually did this when Mr N spoke with his son – who, quite easily, realised something wasn't right and led to the scam being uncovered.
- Because of this, and in these specific circumstances, I thought it was fair to hold Mr and Mrs N responsible for their loss too by applying a 50% reduction due to contributory negligence.

I therefore remained of the view that HSBC refunding £63,793.80, and paying £300 compensation, resulted in a fair outcome here.

R confirmed Mr and Mrs N remained of the same view as they'd outline earlier – in that a reduction for contributory negligence isn't fair, nor is it consistent with other decisions made by the Financial Ombudsman. And so, a final decision was requested.

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 appreciate R, and Mr and Mrs N, disagree that a reduction in the award due to contributory negligence is fair. But in the absence of any further points for my consideration, I see no reason to depart from the above – as I think HSBC failed to protect Mr and Mrs N from the scam, but I also consider Mr and Mrs N were partly responsible for what happened too. And so, I therefore remain of the view that both parties should share equal responsibility for the loss Mr and Mrs N suffered from this scam.

It follows, to put things right, HSBC should refund Mr and Mrs N £63,793.80. HSBC should also pay £300 compensation to recognise the trouble and upset Mr and Mrs N experienced because of the scam too.

My final decision

My final decision is that I uphold this complaint in part. I direct HSBC UK Bank Plc to

- Refund Mr and Mrs N £63,793.80; and
- Pay them £300 compensation.

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

Daniel O'Dell
Ombudsman