DRN-4348040

The complaint

Mrs B and Mr B complain that HSBC UK Bank Plc (HSBC) wouldn't refund money they lost in a scam.

What happened

What Mrs B and Mr B say:

Mrs B and Mr B are represented by a third-party firm of solicitors, but I will refer to them as the complainants.

Mr B took some money out of his pension fund to invest for his retirement. He had previously invested in another company which turned out to be a scam. Mr B researched the best way to invest online and in newspapers.

In August 2017, Mr B was cold called by someone purporting to be an employee (who I will call 'A') of an investment firm (which I will call 'C'). Mr B says the person ('A') may have got his contact details from his online research – he had submitted inquiries on online forms.

A explained he would email Mr B with examples of investment opportunities and the returns he could expect. A said Mr B could grow an investment of £20,000 to £26,000 in three years. He sent Mr B illustrations. A stayed in contact with Mr B and built a rapport with him. Mr B said A was polite and not pushy. Mr B said he looked at the investment company's (C) website and it seemed genuine. A said Mr B could log onto the website to see his investment and track its performance every six months.

A sent Mr B an invoice for £20,000 and he went to a branch of HSBC and made a payment for £20,000 on 8 December 2017.

Mr B stopped receiving updates and became suspicious. He went to London in December 2019 to visit C's offices but found it didn't exist. He then realised he was the victim of a scam.

Mr B says that when he made the payment, he wasn't provided with any warnings or asked any questions by staff. HSBC didn't ask him why he was making the payment, or if he knew the business he was paying. He says HSBC should've asked him more questions, and if they had, the scam would've been uncovered and he wouldn't have made the payment. He says HSBC should refund the money.

Mr B reported the scam to HSBC in August 2020.

What HSBC say:

In their final response in August 2022, HSBC said they processed the payment in accordance with Mr B's instructions. Given the passage of time since the payment, they didn't approach the recipient bank as there wasn't any chance of getting the money back.

Our investigation so far:

Mrs B and Mr B brought their complaint to us in August 2022. Our investigator said HSBC should refund £20,000 plus interest at a rate of 8% per annum simple. She looked at HSBC's operating instructions that were in place at the time. Although these didn't include significant questioning, she said HSBC should still protect customers and question unusual transactions. Because this was a high value payment, done in branch, there was an opportunity for HSBC to do that. Had they done so, she said HSBC would've realised this was a high-risk investment. HSBC could then have provided information on scams and advised Mr B that it might not be legitimate. She noted also that Mr B was cold called. She didn't think the promised returns of £6,000 over three years was unrealistic.

HSBC didn't agree. They said:

- They questioned why the payment was made to an account in another name other than the investment company.

- The documents provided by A about C should've been independently verified.

- They couldn't see why Mr B took between December 2019 (when he realised he had been scammed) and August 2020 to contact HSBC. HSBC said a reasonable person would've reported it straight away.

- There seems to be a genuine investment company operating with the same name.

- The returns were too good to be true. The scammer's documents promised between 21% and 44%, which was very high.

- The branch procedures in place at the time said HSBC should only ask about the purpose of the payment – and the branch must have done that.

- The standards required of banks at the time of the payment were less rigorous than later. They were only required to ask about the purpose of the payment – the standard of inquiries they were required to make in December 2017 were less than they were later.

- Even if HSBC's staff had asked about the payment, it was likely that Mr B would've gone ahead. They noted Mr B had been impressed by the professionalism of the brochures provided, and he had carried out research; and there weren't any published warnings about C. A return wasn't expected for 12 months. So – it wasn't clear what warnings HSBC could've given him about the payment anyway.

- There was a large cheque payment of £45,000 on 27 November 2017, so the payment in question wasn't out of line with that.

Mr B shouldn't receive any interest on the money – as he would likely have made an investment in another high-risk scheme (as he did in July 2018). And it didn't seem fair he should receive five years' worth of interest – when he didn't bring his complaint forward until late 2022.

Because HSBC didn't agree, the complaint came to me (as ombudsman) to look at and I issued a provisional decision which said:

In broad terms, the starting position in law is that a bank is expected to process payments and withdrawals that a customer authorises it to make, in accordance with the terms and conditions of the customer's account. In December 2017, there were some circumstances where a bank should have taken additional steps before processing a payment to help protect customers from the possibility of financial harm. For example, there were some guidelines which should have been followed when older or vulnerable customers asked to make unusually large cash withdrawals or where someone appeared to be telling them what to do.

In recent years, there has been an increase in sophisticated fraud and scams, leading to greater expectations of banks in terms of its role in preventing fraud. This started with a super complaint in September 2016. For example, the British Standards Institute's 'Protecting Customers from financial harm as a result of fraud or financial abuse – Code of Practice' was published in October 2017. This recognised that banks should look to identify and help prevent transactions – particularly unusual or out of character transactions - that could involve fraud or be the result of a scam.

It was later – that the expectations of banks were increased: with the Banking Protocol in 2018; and the Financial Conduct Authority's Banking Conduct of Business Sourcebook S 5.1.10A (R) (since 13 January 2018) & 5.1.10B (G) (since 19 December 2018).

And the Contingent Reimbursement Model (CRM) Code, effective from 28 May 2019, was set up to provide protection for customers who fall victim to Authorised Push Payment (APP) scams, and also to reduce the occurrence of APP fraud.

Bearing all of this in mind, I need to decide whether HSBC acted fairly and reasonably in its dealings with Mrs B and Mr B when Mr B requested the payment, based on the expectations of banks in 2017. I also need to consider whether HSBC did all that it ought to have done when Mr B reported that the payments were fraudulent. Having done so, I'm not persuaded HSBC should refund Mrs B and Mr B the amount they lost.

The British Standards Institution (BSI) code came into existence in October 2017 – just before the scam payment in question. So that's relevant – as it was the main guidance in operation for banks at the time. This code of practice gives broad recommendations for how banks can protect customers from fraud and financial abuse, and it explains how to recognise consumers who might be at risk. It includes the following activities as examples of what might indicate fraud (I list the relevant ones in the context of this case):

- A sudden increase in spending
- A withdrawal or payment for a large amount
- A payment or series of payments to a new payee

I looked at HSBC's operating instructions in place at the time – December 2017. They ask staff to ask the purpose of the payment, establish the customer's identity, ensure there are sufficient funds to make the payment, and ensure there's no possibility of money laundering. Those instructions are much different to HSBC's obligations later. They do not, for example, require staff to ask open questions about a payment, or where the customers got the payee details from, how they were contacted, what the investment is for and its prospects, and what research was done. Those questions were mandated later.

So in summary, the obligations of HSBC regarding whether a payment was part of a scam, or not, were far less than they were later on.

I looked at Mrs B and Mr B's account.

Apart from day to day living expenses, there were some other large payments as follows:

February 2017: £5,004.49 – cheque
March 2017: £2,320 – cheque
March 2017 - £2,250 – cheque
April 2017 : £3,000 – cheque
June 2017: £2,000 – cash
June 2017 : £2,000 – cash
July 2017: £2,000 – cheque
August 2017: £2,000 – cheque
October 2017: £2,000 – cash
November 2017 : £5,000 - bill payment
November 2017: £45,000 – cheque

I think it's reasonable to say that there were regular and fairly large payments from the account – although I accept not as large as the payment made in respect of the scam.

There was then a large credit for £150,090 on 20 November 2017 – which I assume was the withdrawal from Mr B's pension fund. There was then a cheque payment of £45,000 on 27 November 2017**.** We asked Mr B what this was – and it was payment to a savings account.

This cheque payment was just a few days before the payment in question. So I think it's reasonable to say that on balance, the scam payment wasn't out of character with Mrs B and Mr B's normal account activity. And this, added to the expectations of HSBC at the time, means that I don't think it's reasonable to say that HSBC's staff should've questioned it.

I've then gone onto to consider – what might have happened had HSBC's staff asked Mr B questions – and I'm persuaded that he would've gone ahead anyway. I say that because:

- In his testimony, he said he was impressed by the information given to him by A about C.

- He had looked at the website and said it appeared genuine.

- He had established a rapport with A and seemed convinced the investment was genuine.

- The returns offered by the investment seemed (to me) to be reasonable – a return on an equity investment of circa 30% over three years, although high, wasn't out of the question.

- Mr B had researched the market and was looking to make investments.

- Mr B had experience of other investments in the past – he says he lost money on another scammed investment – so he must have been convinced that C's was a good one.

- I noted that he made several other investments before and after the scam payment. He invested £20,000 in July 2018 (and made another complaint to HSBC that that was also a scam). He made payments to savings accounts of £45,000, £30,000 and £20,000 in November 2017 and December 2017. So it seems reasonable to say that Mr B was planning to make several investments or savings account transfers, of which this was one.

- So on balance, I think that even if HSBC questioned him about the payment, it's likely that he would've gone ahead anyway.

Recovery:

When a scam is reported, we expect firms to contact the recipient bank to try to recover the money. HSBC said that as the scam took place in December 2017, and Mrs B and Mr B reported it to them much later - in August 2020 - there was very little chance of recovering any money, and therefore they took no action. I think that's a reasonable thing for HSBC to have done. Our experience with scams is that money is removed within hours, or even minutes of it being credited to the bank account.

Mr B has lost a lot of money and it was part of his retirement fund, so I appreciate the impact it has had on him and his wife. He will therefore be disappointed by my provisional decision, but I'm not intending to ask HSBC to do anything here.

Responses to the provisional decision:

HSBC made no further comments, but Mrs B and Mr B's representatives did. They said:

1. The investigator said HSBC should refund the money and HSBC were at fault.

2. HSBC should've been aware of emerging types of scams at the time of the payment on question.

3. They said that a one-off payment of £45,00 didn't mean the scam payment wasn't unusual, and questions should've been asked of Mrs B and Mr B. Had this happened, Mr B would've done more research, uncovered the scam and not made the payment.

I now need to consider these further comments and make a 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.

Taking each point:

1. It is our process that if either party to a complaint disagree with the investigators' view, then the complaint is passed to an ombudsman to look at and make a decision. That decision is based on everything being looked at afresh and independently of the investigator – and that's what I've done here. I think Mrs B and Mr B's representative will be aware of that.

2. It is the case that there were fewer obligations on all banks to identify potential scam payments at the time – in December 2017. I've set that out in the provisional decision.

3. I set out the other large payments made by Mrs B and Mr B – and as I said, they were of lower value than the payment of £20,000. But – particularly given the lower obligations of banks at the time, I believe HSBC acted reasonably in not stopping the payment.

   I also set out in the provision decision – that I I'm persuaded that even if HSBC had questioned the payment, Mrs B and Mr B would've gone ahead anyway. I also noted that Mr B had between August 2017 (when he was first contacted) and December

2017 (when the payment was made) – to carry out research into the company – which was a reasonable amount of time to make an informed view on the scheme.

Therefore, my final decision is in line with the provisional decision.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs B and Mr B to accept or reject my decision before 11 October 2023.

Martin Lord
Ombudsman