

The complaint

Mrs S complains she was the victim of an investment scam and that HSBC UK Bank Plc didn't do enough to recover her money.

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.

Mrs S was introduced to an investment broker who claimed to work for an online investment company I'll refer to as "T". Between 20 May 2019 and 12 June 2020, Mrs S made several transactions by both bank transfer and debit card from her HSBC account totalling £43,678.45 (four transactions totalling £38,180.30 by online transfer and eight transactions totalling £5,498.15 using her Visa debit card).

The broker told Mrs S to make payments to a cryptocurrency exchange company before sending the money to an online wallet. She was given access to a trading account and sent pictures showing the balance. The broker sent photos of what she had to press and which wallet address to send the funds to. He also sent reports detailing her profits and encouraged her to invest more.

When Mrs S attempted to make an international payment of £10,998.96 on 31 May, HSBC blocked the payment and contacted her to discuss the payment before allowing it to go through.

She realised she'd been the victim of a scam when she was told she couldn't make a withdrawal without paying £32,000 for an 'international monetary fund code', despite having already paid a release fee. She asked the broker to close her account and withdraw her funds, but the request was declined.

Mrs S contacted HSBC to dispute the payments she'd made. She told it that at the time she made the payments, she didn't think T was operating a scam and she didn't receive any warnings that this might be the case. She said T's website and the paperwork she'd signed had made it look legitimate, and she had researched the telephone number and company name. She was also convinced by the fact she was paying money to an American bank.

HSBC said the CRM Code didn't apply because these were payments to an international account. It also said Mrs S was out of time for a chargeback claim. Mrs S wasn't satisfied and so she complained to this service arguing HSBC hadn't done enough to either prevent the scam or to help her get her money back by raising a chargeback request or refunding the money.

Our investigator was satisfied that T was operating a scam because it wasn't regulated in the UK (or any other jurisdiction) to carry out binary-options trading, indicating they were operating illegally and not carrying out legitimate trading. She also noted there were several reports in the public domain stating that T was operating a scam and that while this wasn't evidence of fraud, it did add to the overall picture of T being scammers.

Our investigator considered Visa's chargeback rules, but she explained the code required very specific evidence that Mrs S didn't have, therefore Visa would have deemed the chargeback request invalid. She concluded that in declining to process a chargeback claim on Mrs S's behalf, HSBC was properly exercising its discretion. She also explained that from 1 December 2018, Visa required all merchant acquirers dealing in unauthorised and unlicensed binary options, Forex, CFDs and spread betting to re-code under a 'high risk' gambling code and if their merchant acquirers processed the transactions under a different code, card issuers could process a chargeback on this basis if they would have otherwise declined it. But there was a very short time limit for this to have applied and, in this case – the code wasn't suitable because the claim was made outside of this limit.

Our investigator noted there were no warnings about T on either IOSCO's Investor Alerts Portal or the FCA website, so she didn't think HSBC ought to have automatically blocked the payments. And she didn't think the payments Mrs S had made before 31 May were particularly unusual or suspicious because her bank statements dating back to January 2019 showed payments of similar values, meaning the disputed payments didn't stand out as unusual.

But she did think the international transfer on 31 May 2019 should have triggered a warning, because it was an international payment to a new payee, and there was no history of Mrs S having made international transfers for such large amounts in the months prior. She said that if HSBC had invited Mrs S to check whether the payee was registered with the FCA, it was likely Mrs S would have looked more closely into T before proceeding with the payments and could have discovered they weren't regulated.

Our investigator explained that there is a general principle that consumers must still take responsibility for their decisions, but she concluded Mrs S wasn't to blame for what happened and she didn't think she could have foreseen the risk that T was operating a scam. So, she didn't think it would be fair to reduce the compensation she was entitled to.

She therefore recommended HSBC should refund the three debit card payments that Mrs S had made after 31 May, which comprised of £465.98 (£12.81 transaction fee), £438.02 (£12.04 transaction fee) and £465.56 (£12.80 transaction fee). She also recommended HSBC should refund all international payments, together with the fees of £12. This should include 8% simple interest from the date she made the payments.

HSBC has asked for the complainant to be reviewed by an ombudsman. It's said it's unclear why Mrs S considered high risk investments were appropriate for her and argued our investigator failed to acknowledge that the formation of Mrs S's relationship with the broker was suspicious and the suggestion that she might return \$426,180 from an investment of \$500 was implausible and 'too good to be true'. It disputes that Mrs S couldn't have foreseen the risk that T was a scam as she came across it on social media.

It has said it's unclear whether Mrs S was dealing with a single merchant, but that she paid four separate payees and that there were no warnings about either T or any of the crypto exchanges. It has gone on to state that our investigator's opinion gave no consideration to the fact there were multiple payees, and is inconsistent with other cases where there has been no 'credible' material to suggest a scam existed at the time the payments were made.

HSBC has said it's not clear why our investigator concluded there were fraud triggers. It's also commented that Mrs S had already considered online reviews so it doesn't accept it could have disturbed the scam based on a single conversation with her. Further, it doesn't accept Mrs S would have paid attention to a warning (nor does it consider there were

sufficient grounds to provide one at the time suggested), arguing it's most likely she would have continued with the payments regardless of an intervention.

It has also argued that Mrs S should be liable for contributory negligence as she didn't carry out appropriate research or question the implausible promises she was made. And it has argued that 8% interest should only be applied in exceptional circumstances and interest should be limited to the interest rate which had been applied to the sum to be refunded before it was transferred.

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.

Chargeback is a voluntary scheme run by Visa whereby it will ultimately arbitrate on a dispute between the merchant and customer if it cannot be resolved between them after two 'presentments'. Such arbitration is subject to the rules of the scheme — so there are limited grounds on which a chargeback can succeed. Our role in such cases is not to second-guess Visa's arbitration decision or scheme rules, but to determine whether the regulated card issuer (i.e. HSBC) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder (Mrs S).

Chargeback is a voluntary scheme and HSBC is bound by the card scheme operator's (Visa in this case) rules. But being the victim of a scam doesn't automatically entitle the payer to a refund through the chargeback scheme. HSBC didn't raise a chargeback claim because, for the claim to be successful, Mrs S would've needed to show the cryptocurrency exchange companies didn't provide the intended service, which they did. I'm satisfied therefore that HSBC's conclusion that the chargeback claim would be unsuccessful was fair.

Should HSBC refund any money?

I'm satisfied T was operating a scam because it wasn't regulated in the UK (or any other jurisdiction) to carry out binary-options trading meaning it's likely it was operating illegally. Further there were reports in the public domain stating that T was operating a scam and while that isn't evidence of fraud, it does support that T were scammers.

I'm also satisfied that although Mrs S didn't intend her money to go to scammers, she did authorise the disputed payments. I understand she wouldn't have authorised the payments if she'd known the investment was a scam, but HSBC is expected to process payments that a customer authorises or instructs it to make, and that is what it did. The Payment Services Regulations (PSRs), state that payments are authorised if the payer consented to them and, in this case, I'm satisfied Mrs S consented to the payments as at the time she believed she was making payments to legitimate companies.

However, where the customer has been the victim of a scam, it may sometimes be fair and reasonable for the bank to reimburse them even though they authorised the payment. Mrs S has lost the payments she made to accounts that she held at cryptocurrency exchange companies. Buying cryptocurrency is a legitimate activity and therefore the extent of what we would expect HSBC to have done to protect Mrs S is restricted to 'triggers', meaning I need to consider whether any of the transactions were so unusual that HSBC ought to have intervened to warn Mrs S when she tried to make the payments.

Should the payments have triggered a warning?

I've considered the payments in the context of whether they were unusual or uncharacteristic of how Mrs S normally ran her account and I agree with our investigator that, up to the point Mrs S made the international payment on 31 May, none of the payments were suspicious or unusual for how Mrs S normally ran her account.

However, I think the online transfer Mrs S made on 31 May should've triggered a warning because it was an international payment to a new payee, for an amount which was significantly higher than previous payments on the account. The available evidence shows that HSBC did contact Mrs S when she tried to make this payment but there's no call recording or evidence that Mrs S was given a meaningful warning during the call and, as the payment was allowed to go through without the bank keeping a record of what was discussed, I think it's unlikely that she was.

I think it's likely that if Mrs S had been asked more probing questions beyond whether she knew the payee, she would have disclosed the involvement of a third-party broker and, if she had, HSBC would likely have told her about the risks involved with this sort of investment and advised her to do some more research. There is no evidence Mrs S was willing to take risks or that she had a history of speculative investments or gambling, so I'm satisfied in those circumstances it's likely she would've made further enquiries into whether or not T was regulated. If she had, she would likely have discovered T wasn't regulated, or that there were other reports that T was operating a scam and she probably would have had second thoughts about going ahead with that and all future payments. Consequently, I agree with our investigator that HSBC should refund the three debit card payments (and the associated fees) that Mrs S made on 3 June 2020 and the four international transfers (and the associated fees) she made between 31 May and 12 June.

I've considered whether there should be any reduction for contributory negligence, and I don't think there should. While I accept the broker's assurances were farfetched and Mrs S had made payments to multiple payees, the scam was sophisticated and, without a warning from HSBC, I don't think Mrs S could reasonably have been expected to do anything to protect herself from financial harm in the circumstances. I think HSBC – as the financial professional – had better insight into this type of scam and Mrs S wasn't to know that the trading account she'd been provided with was likely fake or a simulation.

The refund should include a payment of 8% simple interest on the refunded payments from the date they were paid until the date they are refunded. HSBC has argued this puts Mrs S in a better position to the position she would have been in if she hadn't made the payments as she wouldn't have obtained interest at such a level. However, the sum isn't intended to reflect the interest she might have earned on the money, rather, it reflects the fact she has been deprived of the money and is based on the current statutory interest rate on judgement debt.

My final decision

My final decision is that HSBC should:

- refund £1,369.56 (the debit card transactions) and £37.65 transaction fees.
- refund £38,180.30 (the online transfers) and £12 transaction fees.
- pay 8% interest* on the above from the date of the claim to the date of settlement.

*If HSBC deducts tax in relation to the interest element of this award it should provide Mrs S with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 18 January 2023.

Carolyn Bonnell
Ombudsman