

## The complaint

Mr M complains that HSBC UK Bank Plc (HSBC) won't refund the money he lost to a scam.

## What happened

The background to this complaint is well-known to both parties, so I won't repeat it in detail here. But in summary, Mr M fell victim to an investment scam by a company I'll refer to as C. He found them promoted online in late 2017. He spoke to a broker who offered him a bonus for his initial deposit and persuaded him to open a managed account with them. His understanding was that C would be trading for him, primarily in cryptocurrency. He says C also told him they were regulated, and that he'd be able to withdraw funds from the account.

With the account appearing to be making good returns, and with C offering him bonuses and encouraging him to invest more, Mr M was persuaded to keep depositing funds. He made the following payments to C from his HSBC credit card:

Date	Amount
9 October 2017	£383.87(Transaction fee £11.48)
13 October 2017	£1,887.18(Transaction fee £56.43)
10 November 2017	£762.70(Transaction fee £22.80)
10 November 2017	£763.46(Transaction fee £22.83)
10 November 2017	£764.23(Transaction fee £22.85)
31 January 2018	£708.20(Transaction fee £21.18)
31 January 2018	£708.90(Transaction fee £21.20)
<b>Total</b>	<b>£5,978.54(Transaction fee £178.77)</b>

Plus the following from his HSBC debit card:

Date	Amount
10 October 2017	£1,914.93(Transaction fee £52.66)
10 October 2017	£3,829.86(Transaction fee £105.32)
10 October 2017	£1,914.93(Transaction fee £52.66)
16 October 2017	£1,887.18(Transaction fee £51.89)
16 October 2017	£1,887.18(Transaction fee £51.89)
16 October 2017	£1,887.18(Transaction fee £51.89)
16 October 2017	£3,774.35(Transaction fee £103.79)
19 October 2017	£1,902.69(Transaction fee £52.32)
19 October 2017	£1,903.45(Transaction fee £52.34)
13 November 2017	£3,813.50(Transaction fee £104.87)

13 November 2017	£3,814.27(Transaction fee £104.89)
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13 November 2017	£3,814.27(Transaction fee £104.89)
13 November 2017	£1,906.75(Transaction fee £52.43)
1 February 2018	£354.10(Transaction fee £9.73)
1 February 2018	£1,770.49(Transaction fee £48.68)
<b>Total</b>	<b>£40,188.62(Transaction fee £1,105.12)</b>

In early 2018, he wanted to withdraw some funds – and was told that, subject to a commission fee, this wouldn't be an issue. But then his withdrawal request (for \$1,000, much less than the amount showing in his account) was declined. C said this was due to the bonuses paid into his account. And that he couldn't withdraw *any* funds until reaching a trading volume 40 times the bonuses applied. When he tried to query this with his account manager, they evaded him, claiming there was an issue with the phones, then that they were unwell. Mr M looked into C further and found out that, despite their claim, they weren't regulated by the FCA. He then reported the scam to HSBC. It attempted to raise chargeback claims on some payments, but says it couldn't pursue these successfully as C defended the claim and Mr M couldn't provide the specific information required.

Our investigator upheld the complaint. She concluded that HSBC should refund the credit card payments as it was liable for these under Section 75 of the Consumer Credit Act 1974. And while she didn't think HSBC would have been able to raise a successful chargeback claim for the remaining payments, she thought it should have prevented some of these – so recommended that it should refund Mr M from his third debit card payment.

Mr M has accepted the investigator's view, but HSBC disagrees. In summary, it says:

- It's unfair to expect it to have contacted Mr M about the payments. And even if it had, it disputes that this would've prevented the scam.
- There are some contradictions and/or a lack of clarity about some aspects of the scam. Such as whether Mr M was told he could withdraw funds initially, or after a few months.
- Mr M was negligent in researching C and so should bear some of the loss.
- There's not a specific enough misrepresentation to show that it's liable under a Section 75 claim.
- The 8% interest rate applied for when Mr M was out of pocket is unfair.
- It also disputes that it could have raised successful chargeback claims. However, the investigator didn't uphold the complaint on this basis.

As no agreement has been reached, the case has been escalated to me to determine.

### 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.

Having done so, I've decided to uphold it for these reasons:

### The debit card payments

- It's accepted that Mr M fell victim to a scam. It's also accepted that he authorised these payments. In line with the Payment Services Regulations, HSBC has a duty to execute authorised payment instructions without undue delay. So even though Mr M was duped into making the payments, the starting position is that he's liable.
- But there are some situations where we believe that banks ought to have identified a potential fraud risk, so should have looked at the wider circumstances surrounding the transaction before making the payment. If they failed to do so, and that failure led to a fraudulent loss for their consumer, it may be fair to hold them liable.
- Although HSBC considers that too high a standard has been applied in this respect, we have a duty to resolve complaints based on what we consider to be fair and reasonable in all the circumstances, taking into account not just the law, but also regulators' rules and guidance, relevant codes of practice and what we consider to have been good industry practice at the time. In line with this, I consider it reasonable to expect that HSBC should have measures in place to identify, and respond to, signs of possible fraud. Such as uncharacteristic account activity.
- In line with Mr M's account use, I don't consider the first two payments to have been so unusual that HSBC should have identified a fraud risk. But by the time of his third payment on 10 October 2017, a suspicious and uncharacteristic pattern of account activity had emerged. He'd made three international payments to a new payee in quick succession, totalling over £7,000. This was out of keeping with how he generally used his current account and debit card. So I've considered what would have happened if HSBC had responded proportionately to the fraud risk, such as by questioning him about the payment.
- Given the prevalence of investment scams, especially involving companies claiming to be dealing with these types of high-risk investments, HSBC could have warned Mr M about the features of these scams, and guided him on what to check to satisfy himself on whether C were legitimate. Despite their claims, they weren't regulated. Nor were they registered with the Gambling Commission, despite branding themselves a "CFD" company.
- I've no reason to doubt that Mr M, who wasn't an experienced investigator, would have heeded such a warning from his bank about the risks of these scams and/or would've followed further guidance on what he should check. I think this would've uncovered the scam as it would have alerted him to indications that C weren't legitimate. Such as their deception about being regulated. And so, but for HSBC's failure to intervene appropriately, I consider it likely that all but the first two debit card payments could have been prevented. It's therefore fair to hold it liable for this loss.
- Despite HSBC's queries and allegations about Mr M's lack of research, I'm conscious he didn't reasonably have the same level of knowledge about these types of scams as the bank. He was persuaded by the sophisticated nature of the scam, such as the contact with the alleged broker plus the professional-looking website and trading platform. I therefore don't consider him partly to blame by way of contributory negligence. Rather, I think he simply didn't foresee the risk this was a scam until he was reasonably alerted to this by C's response to his withdrawal request.
- I've also considered if the first two payments could have been recovered through the voluntary chargeback scheme. Under the relevant rules in force at the time, in order to claim successfully, Mr M would have needed written evidence of C guaranteeing an amount of profit or return he was due to receive. As he didn't have this, I don't think HSBC could reasonably have been expected to pursue a chargeback claim further. It's unlikely this would have recovered his loss.

### The credit card payments

- Looking solely at the credit card account activity, I don't consider the payments to C so unusual that HSBC should have intervened. Regardless, I consider it liable for these payments under Section 75 of the Consumer Credit Act 1974.
- I can't see this is in dispute, but in broad summary, I'm satisfied 'Section 75' is a relevant consideration here as:
  - There's a debtor-creditor-supplier agreement falling under Section 75. Mr M is the debtor, HSBC the creditor, and C the supplier (as shown on the statements);
  - The transactions were financed by Mr M's credit card agreement with HSBC (the deposit-transactions); and
  - His claim doesn't relate to a single item to which the seller has attached a cash price of less than £100 or more than £30,000
- In line with this, Mr M has a valid claim of misrepresentation against HSBC if it can be shown that C made a false statement of fact which induced him into entering into an agreement. On balance, I'm satisfied this is the case for the deposits he made.
- The FCA went on to publish a warning that C were operating without being properly regulated. That's a sign it was operating with dishonest intentions. This is also backed up by what Mr M has told us about how they operated (such as evading his requests for contact after rejecting his withdrawal request) and other information online. In my view, this adds credibility to what Mr M has told us that C misrepresented itself to him, such as by claiming to be regulated.
- Likewise, I accept that Mr M was likely told by C that he'd be able to withdraw his funds. I appreciate HSBC's point about whether he'd be able to do so immediately, or after a few months. But he wasn't able to do either. Overall, it seems credible and likely Mr M was led to believe he could access and withdraw funds from the account he held with C with relative ease, and wasn't told he'd need to reach any particular trading volume if any bonuses were paid (as they were from the first transaction). Given the bonuses applied, in line with the term C applied, Mr M would have needed to reach a trading volume of over \$1,600,000 before he could make *any* withdrawals.
- Overall, I'm persuaded C misrepresented themselves as running a genuine, regulated trading platform through which Mr M had the opportunity to make money – which he'd then be able to access. Whereas they were likely running a scam intended to relieve him of his funds. And I'm persuaded that, if Mr M had known this, he wouldn't have deposited any money with them. As such, he was induced into the contract on the basis of these misrepresentations.
- If the deposit-transactions hadn't been made, the transaction fees wouldn't have been incurred. So these were a direct consequence of the deposit-transactions. And it was also foreseeable that such fees would be charged for converting the payments. So I'm satisfied these are a consequential loss of the misrepresentation. That means HSBC is therefore liable for these, and for the deposits he made to C. Mr M wouldn't be entitled to any more than this through a breach of contract claim.

### Interest rate

- On most occasions when Mr M paid C using his debit card, he transferred funds from other accounts shortly beforehand. He's confirmed these funds were effectively savings. So I accept that the account interest rate from the originating accounts, rather than 8% simple interest, is the fair rate to apply to these.

- This applies to all the debit card payments, aside from those on 13 November 2017. Mr M transferred in £1,600 from other accounts shortly beforehand. But the payments to C that day significantly exceeded this. The remainder came from his current account. I'm mindful he'd received a £15,000 loan payment just over a week before, most of which remained in his account. Mr M has explained he took out the lending for another purpose, but he didn't need all the money immediately, so he simply used his used the funds in his current account. In the circumstances, aside from the initial £1,600, I consider 8% simple interest to be fair – as it reflects money he was out of pocket for due to the scam.
- For the credit card payments, in line with our general approach for when consumers are deprived of funds, I'm satisfied 8% simple interest for any sums repaid.

### **Putting things right**

- HSBC UK Bank Plc should refund Mr M all the credit card payments made to C, as listed above. And it should rework the account so that any interest or charges caused by those payments are refunded. It should also pay 8% simple interest on any sums repaid towards the credit card balance arising from those payments, from the date they were repaid to the date of settlement (less any tax properly deductible);
- It should also refund Mr M the debit card payments I've listed – and their associated transaction fees – from his third payment to C (on 10 October 2017) onwards. It should also pay interest from the dates of payment to the date of settlement at the following rates. For the payments on 10 October 2017, 16 October 2017, 19 October 2017 and 1 February 2018, and for the first £1,600 paid on 13 November 2017, interest should be applied from the date of payment to the date of settlement at the account interest rate from the originating accounts. For the remaining amount paid on 13 November 2017, 8% simple interest should be applied from the date of payment to the date of settlement.

### **My final decision**

For the reasons given above, my final decision is that I uphold this complaint. I direct HSBC UK Bank Plc to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 28 July 2022.

Rachel Loughlin  
**Ombudsman**