

The complaint

A company, which I will refer to as H, complains that HSBC UK Bank Plc didn't do enough to prevent them losing out financially as a result of an authorised push payment ('APP') fraud.

What happened

The background to the complaint is known to both parties and so I won't repeat it at length here. Briefly, in October 2019, H set up a payment of €100,000 from their euro business premium account to their foreign exchange provider.

H has explained that the payment was to be made to their forex provider so that they could in turn pay H an equivalent amount in pound sterling into their sterling business account, and this was for payment of wages to H's staff.

On the day H set up the payment, they received an email purportedly from their forex dealer requesting to amend the payment details. There was nothing suspicious about the email and the director of H proceeded to carry out the instruction. He called their bank to enquire how to amend the payment details. With the help of the bank's staff over telephone, he amended the details and made the payment to the revised account.

Unfortunately, this turned out to be a fraud and that came to light a week later. H contacted their bank who in turn contacted the beneficiary bank. However only about £4 could be recovered from the beneficiary's account.

H complained to HSBC that it failed to prevent the fraud and the resultant financial loss to H. They said that HSBC failed to question the receipt of such a large amount into a newly opened account, and it had also failed to question the way the fund was quickly withdrawn from the account.

HSBC said that as soon as it was notified of the fraud, it acted promptly but by then unfortunately most of the money had been withdrawn by the beneficiary.

H has also complained about their bank – which I will call Bank A - and wanted us to consider both the complaints together.

One of our investigators considered both the complaints. In relation to this complaint they were of the view that HSBC could have done more when the money was received into the beneficiary's account and quickly withdrawn. They felt that HSBC had missed an opportunity to help prevent the fraud and consequent loss to H. So, they considered it fair that it compensates H for the loss. However, having considered the other complaint against Bank A, they concluded that there had been some error or omission on part of Bank A as well. So, they said that it would be fair that both the banks share the liability equally. Therefore, the investigator recommended that HSBC should refund €50,000 to H together with simple interest at 8% p.a.

HSBC did not agree with the investigator's opinion. In summary it said:

- The bank's responsibilities as paying bank and as receiving bank are distinct and fundamentally different. It is important to recognise this.
- The fact that a large sum was received into an account needn't necessarily be a cause for concern. Businesses operate in a variety of ways which may result in large sums being received on occasions.
- Even if the bank had blocked the outgoing payments and queried its customer, it is possible that their customer would have given a viable explanation for the receipt of the funds. In such circumstances there would be nothing more the bank could have done anyway.
- The fact that the payment details were changed was suspicious and warranted questioning by the paying bank. There is no indication that any or any proper questioning took place in that respect. So, it is not clear why the paying bank has not been asked to bear full responsibility in this case.
- Further, it is reasonable to expect that H acted competently in verifying the payment details and choosing whether to make the payment. H should have had in place measures to protect them from falling victim to frauds such as this. As such, it is fair and reasonable that H should bear responsibility for the loss it suffered or share it with the paying bank as discussed above.
- Any interest awarded should be limited to the rate of interest on the account from which the payment was made.

The investigator considered what HSBC has said but remained of the view that their recommendation is fair. They explained why and gave a deadline to both parties to respond. Whilst H accepted the investigator's opinion, HSBC reiterated that a change in account details was suspicious and both H and the paying bank failed to question this before making the payment.

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.

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. I have taken that into account when deciding what is fair and reasonable in this case. But that is not the end of the story. HSBC also has an ongoing obligation to be alert to various risks in relation to accounts with it. Specifically, I'm mindful that it:

- must conduct its business with due skill, care and diligence;
- has a longstanding regulatory duty *"to take reasonable care to establish and maintain effective systems and controls for compliance with 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 of the Financial Conduct Authority Handbook);
- must fairly and reasonably be monitoring accounts and any payments made or received to counter various risks including anti-money laundering and preventing fraud and scams. At the material time, those requirements included maintaining proportionate and risk-sensitive policies and procedures to identify, assess and manage risk, e.g. through customer due-diligence measures and the ongoing monitoring of the business relationship including through the scrutiny of transactions undertaken throughout the course of the relationship;

- must have systems in place to look out for unusual transactions or other signs that might indicate risk of fraud. This is particularly so given the increase in sophisticated fraud and scams in recent years.

Ultimately, it is a matter for HSBC as to how it chooses to configure its fraud detection systems and strike a balance between allowing its customers to transact business and questioning transactions to confirm they are legitimate. But where it is alleged that it didn't do enough to prevent a loss which resulted from an APP fraud, I will look into the circumstances of the case and based on what I have seen, decide whether in that case HSBC could have fairly and reasonably done more.

I have also taken into account that H isn't a micro-enterprise and hence isn't covered by the Contingent Reimbursement Model Code.

HSBC has provided relevant information to our service to allow us to investigate this. I am limited as to how much information I can share because it relates to a third-party account. But I'd like to assure that I've carefully reviewed everything before reaching my decision.

Having reviewed the submissions, I agree with the investigator that HSBC could have done more here, for the reasons they have explained.

Briefly, as I understand it, the beneficiary's account was a fairly new, sterling account. There was minimal activity in the first couple of months with small payments going in and out. It is in these circumstances H's payment of €100,000 came in. It was unusually large compared to the previous account activity. Also, unusually, it was a payment in foreign currency.

This was then quickly followed by a series of outgoing large payments. The first outgoing payment itself represented a sudden and uncharacteristic increase in spending and attempted soon after a large non-sterling payment.

So, I agree with the investigator that there was enough going on here that ought to have prompted HSBC to take a closer look at what was happening. I think it is reasonable to expect that HSBC withheld the first outgoing payment and tried to contact its customer and carried out additional checks.

I cannot be certain as to what would have happened had HSBC contacted its customer at that point. I note HSBC's submission that had it contacted its customer at that time it was quite possible that they would have responded and provided a plausible explanation, because they would have wanted to access the money. However, in this case, HSBC had not investigated what had happened until it was alerted to the fraud. There is no evidence it contacted and sought explanation from its customer about the details of this payment. So, I will have to consider what more likely would have happened had HSBC – well versed in carrying out investigations of this nature - looked into this closely, contacted its customer and if they were reachable, asked all the right questions.

I consider that had the bank done so, it is more likely than not that the fraud would have come to light. I can't see how the beneficiary could have given a reasonable explanation for a complete mismatch in name of the payee, especially given that the intended payee was a big financial services firm. I consider that it would have been difficult for the beneficiary to have provided any reasonable explanation as to why they received into their account, a non-sterling payment intended for a big financial services entity or be able to provide proof of entitlement to those funds. Further, as pointed out by the investigator, what happened

was somewhat anomalous to what their customer told the bank when the account was opened.

I appreciate that HSBC needs to strike a balance in the extent to which it intervenes in payments, against the risk of unduly inconveniencing or delaying legitimate payment requests. I acknowledge the main perpetrator here is the fraudster. But overall, I think HSBC failed to recognise the unusual behaviour on the receiving account or respond to it appropriately, and therefore missed an opportunity to help prevent loss to H.

H has complained about both their bank and HSBC. They want us to consider both the complaints, which they are entitled to. The investigator looked into what had happened overall, and found that both the banks could have done more to prevent the loss to H. So, they concluded that both entities should share the loss equally. Given the circumstances, I am satisfied that this is a fair outcome.

I've also considered whether H should bear some responsibility for their loss (or a proportion of it) due to any contributory negligence. But in the circumstances of this complaint, I don't think they should. This was a sophisticated scam. As explained by the investigator, when H received the initial email from the fraudster, it appears to have come from the genuine email address of the dealer. When H replied to that email, unknown to H, the fraudsters were able to divert the response to a very similar but slightly different address. And when the fraudster responded to H's email, once again it came from the genuine address. Further, there was nothing suspicious in the way the emails were written. Thus, H had no idea that a fraudster had intercepted their genuine email chain with the intended beneficiary. So, I don't think their actions can fairly be described as negligent.

Given my finding above that HSBC should refund H €50,000, I next need to consider what interest HSBC should add to this amount to compensate H for the period it was without these funds.

Our usual approach is to apply a simple interest rate of 8% broadly to reflect the opportunity cost of being without the funds. HSBC says that requiring it to pay 8% simple interest on this amount is high. It says there is no evidence to suggest that if H was returned to the position they would have been in prior to making the payment, they would have obtained interest on that sum at that level. So, it says that the interest should not be applied at a level any greater than the prevailing rate of interest for the account.

On the other hand, H has explained to us that the euro payment was to be converted into sterling by their forex provider and paid back into their sterling business account for payment of wages to their staff. They say that their cashflow was severely affected as this money was not received. They explain that they were already in overdraft incurring interest and the non- receipt of this considerable sum of money exacerbated the problem thereby even exceeding their authorised overdraft limit.

I have considered the submissions from both parties. I can see that the funds were intended to be paid into H's sterling current account, as explained by H. I can also see that the account was overdrawn at the time, incurring interest. And to the extent the account information is available, I can see that the account continued to be in overdraft and on occasions went above the authorised limit potentially attracting higher rate of interest. And even where the account wasn't in overdrawn position, I cannot be certain about the precise cost to H of being deprived of this money because they might have used the funds in a variety of ways. So, without any compelling reason to depart from our usual approach, I consider it fair and reasonable that HSBC pays H simple interest at 8% p.a. on the amount to be refunded.

My final decision

I uphold this complaint. In full and final settlement of it, HSBC UK Bank Plc should refund €50,000 (less 50% of any amount that has already been recovered and returned to H) together with interest at 8% simple p.a. Interest should be paid from the date H or their bank first raised the fraud with HSBC until the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask H to accept or reject my decision before 11 April 2022.

Raj Varadarajan
Ombudsman