

The complaint

Miss M is unhappy because HSBC UK Bank Plc trading as first direct did not reimburse the money she transferred to a fraudster.

What happened

I issued my provisional decision on this complaint on 22 March 2022. I wanted to give both parties a chance to consider and respond to my findings before issuing a final decision. That provisional decision forms part of my final decision and is copied below.

What happened

In March 2021 Miss M was moving home – selling her existing property and purchasing a different one. Her solicitor was employed to handle both transactions.

Early that month Miss M contacted her solicitor and asked when a completion statement would be ready. A response was received with an attached completion statement which contained account details Miss M was instructed to pay.

Unfortunately, this email hadn't come from Miss M's solicitor but rather a fraudster who had accessed her email account. Over the next two weeks – through manipulation of Miss M's email account – the fraudster was able to continue the email conversation between her and her solicitor – but changing responses from the solicitor where required to maintain the deception.

On 16 March 2021, Miss M was due to make a payment of £309,128.90 to complete the purchase. Because of the fraudster's deception, she called first direct and asked it to make a payment to account details provided by the fraudster.

During this call ("the Call"), it is undisputed that first direct advised Miss M to confirm the account details she'd been provided with over the phone with her solicitor. The adviser she spoke to also let her know they were unable to confirm whether the name on the account matched that of the solicitors. Neither is it disputed that Miss M attempted to call her solicitor but was unable to get through.

What is disputed is the significance of the Call and its impact on Miss M's liability in this matter. As such, the contents of that call will be discussed in more detail later on in my provisional decision.

Following a second, brief, 'security call', the payment was allowed to proceed. The following day the solicitor advised Miss M that the payment hadn't been received and the scam came to light. The matter was reported to first direct the same day and it, in turn, reported the scam to the bank which received the money.

Over the next several months, Miss M was in frequent contact with first direct. She was unhappy with a number of aspects of how her claim had been handled – particularly the communication she received from the bank's fraud team and a substantial delay in

returning funds which hadn't been spent from the beneficiary account (a matter Miss M also complained about to the receiving bank).

On 6 April 2021 first direct declined Miss M's claim. It said it and the beneficiary bank had sufficient fraud prevention measures in place and Miss M ought to have conducted further checks before making the payment. Eventually, on 19 July 2021, £141,070.60 was returned to Miss M from the receiving bank.

First direct is a signatory of the Lending Standards Board Contingent Reimbursement Model Code ("CRM Code") which requires firms to reimburse customers who have been the victims of APP scams like this in all but a limited number of circumstances. In this case first direct said Miss M had ignored an 'Effective Warning' given during the call to set up the payment (an exception to reimbursement under the Code). It also argued that Miss M hadn't carried out sufficient checks and, while this isn't an exception to reimbursement in itself, it implies that first direct also think Miss M falls foul of another exception – that she didn't reasonably believe that the recipient of the payment was who she was expecting to pay.

Unhappy, Miss M referred the matter to our service. One of our investigators upheld the complaint. They were of the view that warnings given during the phone call weren't impactful enough and didn't go into enough detail about how email interception scams work. They also thought that the email conversations would have been particularly convincing, and Miss M had tried to do as the bank advised but was unable to.

So, they upheld Miss M's complaint and asked first direct to refund her losses. They also thought that the service first direct had provided to Miss M warranted a compensation payment of £150.

First direct didn't agree, in summary it said:

- *The warning was clearly impactful – as Miss M took notice of the advice she was given and attempted to contact her solicitor. It's also clear that she understood that account details could be changed by fraudsters and that she ought to check them.*
- *The warning was intended to make Miss M stop and think – and there was an opportunity for her to reconsider making the payment between the initial call and follow up security call.*
- *Overall, the warning met the definition of an 'Effective Warning' under the Code.*
- *It was also of the view that Miss M lacked a reasonable basis for belief in making the payment – as she didn't follow the bank's instructions and failed to wait for a verbal confirmation of the account details – despite not needing to make the payment until the following day.*
- *She only contacted the solicitor's mobile number, rather than contacting the main office – who'd have been able to confirm the account details.*
- *It didn't think Miss M was reasonable to have been reassured by the fact the adviser was able to confirm the bank account was held at a particular bank – as Miss M had no independent evidence that the solicitors held an account with that bank.*
- *It also pointed to discrepancies in the emails and address they were received from as additional reasons why Miss M ought to have been suspicious.*

- *It also challenged the award of interest at 8%. It didn't think this was fair in the circumstances – considering the Bank of England base rate at the time and the fact that the courts were routinely awarding lower interest rates.*

- Finally, it argued, that even if our service were to conclude that an 'Effective Warning' had not been provided, it was clear that one of the exceptions did apply and, under the provisions of the CRM Code, its liability should be limited to 50% of Miss M's loss.

Despite a further response from our investigator, no agreement could be reached, so the case was passed to me for a final decision.

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.

Having considered this matter carefully, I'm minded to reach a different outcome to that of the investigator. I know this outcome will be extremely disappointing for Miss M, but I hope she'll understand my reasons for reaching it.

Under the provisions of the CRM Code, both the bank and customer have obligations. If it can be shown that the customer has met their 'Requisite Level of Care' then they will receive full reimbursement. If the customer has not done this, then it is for the firm to show that it has met its obligations under the Code. The most relevant obligation here is to provide an 'Effective Warning'. If a firm has not met its obligations then it, subject to any liability by the bank which received the money, will be liable for 50% of the customer's loss.

Did Miss M meet her requisite level of care?

I've first thought about whether Miss M had a reasonable basis for believing the recipient of the payment was who she was expecting to pay. In doing so, I've considered both whether Miss M had such a belief before the Call and whether the Call ought to have challenged that belief.

Prior to the Call I think Miss M had every reason to believe that she had received the account details from her solicitor and had been communicating with her and nobody else over the course of many months.

While first direct point to slight discrepancies in the emails and the differing address, I don't think it's particularly fair to expect Miss M – as a layperson – to have identified such differences. In fact, I'm struck by the way the fraudster didn't simply request a payment from Miss M but was able to maintain the conversation between her and the solicitor. So, when Miss M came to make the payment, she'd received multiple emails – all from the same fraudulent email address – many of which dealt with the detail of the sale and purchase.

So, I think Miss M had a reasonable basis for belief up to the point of the Call.

During the Call, the adviser asks how the account details had been received and, after Miss M confirms they have been received over email, the adviser says the following:

"the reason I'm asking is that we are aware of instances where information has been changed fraudulently in the likes of texts messages, emails, perhaps letters as well. So, I want to give you the opportunity to check the details verbally with the beneficiary before sending the money."

Miss M clarifies that the adviser wants her to check the details verbally and, in response,

the adviser says:

'We do recommend it, checking them verbally with a trusted source, so with your solicitor, over the phone. As I said, it's because we're aware that information can be changed, or has been changed, fraudulently in the likes of emails and texts before. So, just to check that the details are from who you expect and they are correct'

Miss M responds that she is happy if a check of the account details shows the payment is going to the particular bank which the fraudster had specified.

The adviser then asks further questions in an attempt to establish whether Miss M might be falling victim to other types of scam – confirming that she'd seen the property and hadn't been told to mislead the bank about the true purpose of the payment.

The adviser then explains that they will check that the name on the account matches the name given by Miss M but, in this case, they are unable to do this. The adviser then says:

'If you're unsure that the details you have are correct, please check the information with a trusted source before proceeding. How would you like to proceed?'

And, after Miss M appears to show some concern, the adviser continues:

'Some banks, not all banks are signed up for it. And what it means, if they are signed up for it, we can check if the sort code and account number matches the name on the account. But, as I said, not all banks are offering the service and certainly they are not, perhaps not, offering them on all account types. It just means that we cannot confirm that that is the name on that account. So, it's how would you like to proceed with that payment? If the details aren't correct and we send the payment, we may not be able to get the money back. It is a lot of money'

At this point Miss M decides to call her solicitor, which is audible on the call recording I've heard.

The adviser adds – 'Yes, it's also because you've only had them by email and not had them confirmed verbally I think that is, perhaps, a good way to go. To double check.'

After Miss M is unable to get through to her solicitor the following exchange takes place between Miss M and the adviser:

'Miss M: So, do I need to check with her and then come back to you? Is that what I need to do?

Adviser: If you do want to check, then absolutely check and then come back it's just, as I said, it's up to you what you'd like to do but it is a lot of money and.. just... I think making sure that it is going where it should be going to.

Miss M: But what is she likely to say? That they don't subscribe to this payee service? And then what? I come back to you and [inaudible]

Adviser: Absolutely, but certainly at that point you could always confirm the details as well verbally that you have been provided as an email to kind of reassure that is the correct details.

Miss M: But the account and everything is fine, right? You can confirm that is a TSB account?

Adviser: I can confirm that it is a TSB account from the sort code, but all I can do is confirm that that sort code belongs to TSB, I can't confirm that account number belongs to the solicitor.

Miss M: OK. I have it in writing from her. So... and it's on her headed paper. So, you know, it's on her headed paper. So, I guess if they are wrong I can sue the solicitor for it, right?

Adviser: Again, it's because we are aware that information can or has been changed fraudulently in emails. That's if someone had been able to intercept those emails.

Miss M: Look, just go ahead, I'm sure it's fine. I'm sure it's fine. You know, I realise it's a large sum of money but I can't see, I've been dealing with my solicitors for six months now and I can't imagine, this has been so painful I just can't do any more on this. This is the final hurdle.

Adviser: Absolutely, I understand that you are so close to that completion as well but it is, as I said, to make you aware if it isn't correct then we may not be able to get the money back. If you want to go ahead.

Miss M: Oh hang on, she's just replied to me. Hold on. Let me call her now. She's saying have you sent the funds and I'm like [inaudible].

Miss M tries to call her solicitor again but is unable to get through.

Miss M: It's gone to voicemail again, I really want to get it sorted. I think it will be fine, honestly.'

Miss M's attempts to reach her solicitor continue in the background of the Call. The adviser says she'll need to call Miss M back and Miss M says she hopes she'll have spoken to her solicitor before then. But this hasn't happened by the time the brief follow up call has taken place and the payment goes ahead.

The response Miss M refers to receiving during the Call is an email received at 11.19am. It simply says:

'Good morning Miss M

Please let me know if funds have now been

sent Regards'

It appears that Miss M then sent the email below at 11.23am – between the end of the first call and the call back to confirm the payment:

'my bank saying TSB not subscribed to pay in service so they cannot check the details on your account!!

*So i need to verbally check them with you to avoid
fraud: a/c [account number redacted]
sort: [sort code redacted]*

She is setting it up now and then calling me back to confirm once I pass security again.'

Miss M did not receive a response before the payment went ahead.

To make a finding that Miss M held a reasonable basis for belief, I need to be satisfied not only that she thought that the account details were more likely to have come from her solicitor than not. She clearly did believe that. Rather, I need to be satisfied that such a belief was reasonable.

In considering that question, there are a number of factors which are relevant. One is the amount of money involved – in this case a huge sum. Also relevant are the actions which could have been taken by Miss M but weren't and, in particular, the practicality of taking such steps.

Given the amount involved here, I don't think it can be said that Miss M held a reasonable basis for belief where she had at least some doubt about the authenticity of the recipient unless she took all reasonable steps to confirm the accuracy of the account details that were:

- Practical, but not onerous to undertake; and*
- She was aware of.*

While, as noted, Miss M may not have had any doubts about the transaction before the Call –

she did during it. That, I think, is what caused her to pause and try and contact her solicitor a number of times and follow up with an email. The language she uses when deciding to go ahead with the payment also displays this doubt.

It's also evident Miss M was aware of the action she needed to take to remove the risk that had been identified. That action was practical and wasn't onerous, but Miss M decided to proceed without having taken it. While it sounds as if the sale and purchase were stressful experiences for Miss M, her mention of this fact towards the end of the Call, hints at reasons for proceeding with the payment other than full confidence in its authenticity.

Ultimately, I'm afraid, I think Miss M knew she was taking a risk in proceeding with the payment and I don't think that was a reasonably acceptable level of risk in the circumstances – particularly given the amount involved and the relative ease at which that risk could be dispelled. So, I don't think she held a reasonable basis for believing she was paying who she was expecting to pay.

Did first direct provide an 'Effective Warning'?

In considering whether first direct provided an 'Effective Warning' I've taken into account the Call as a whole and whether that conversation met the definition set out in the Code. For a warning to be 'Effective' under the Code it must be: understandable, clear, impactful, timely and specific.

The adviser correctly identified what the scam risk was here and was able to tailor her comments to that specific risk. When it became clear that not only had the account details been obtained over email but also the bank was unable to confirm whether the account was held in the name of the solicitors, the adviser repeated her earlier warnings and was able to clarify and reinforce the reason why Miss M should confirm the details

over the phone. As such, her interventions were timely and she tried to make sure that Miss M understood the risk of proceeding and importantly I think Miss M understood that there was some risk that her payment might not go to the correct account.

I've thought very carefully about the impact of the warning. It clearly did have some impact – it was sufficient to alter Miss M's behaviour and caused her to call the solicitor. And a warning doesn't fail to be impactful simply because it doesn't prevent a scam from taking place – it only needs to be likely to affect the customer's decision making so that the prospect of the scam succeeding is reduced and that's clearly what happened here. The decision taken by Miss M to call her solicitor was directly brought about by the adviser's warning. That warning could and would have prevented the scam had the solicitor answered.

I accept this is a finely balanced point but, overall, I think the warnings Miss M received were effective. I'm satisfied that the adviser explained the risk, how to avoid it and what the consequences were of making the payment – all in a way which Miss M understood and actively took on board. Ultimately the payment proceeded not because of a deficiency in the warning but because her solicitor did not pick up the phone. Miss M chose to proceed regardless, and I'm not persuaded that if the bank had said anything more – short of refusing to make the payment – it would have made a difference.

As I'm satisfied the adviser did enough to warn Miss M and she lacked a reasonable basis for belief, I've decided that first direct are not liable to refund her under the provisions of the CRM Code.

Are first direct responsible for refunding the payment for any other reason?

I'm also mindful that first direct should fairly and reasonably have had systems in place to look out for unusual transactions or other signs that might indicate that its customers were at risk of fraud (among other things). And in some circumstances, irrespective of the payment channel used, have taken additional steps, or make additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

Here, as described already, first direct did recognise the scam risk and this prompted the questions that were asked. For the reasons set out, I'm satisfied first direct took appropriate steps to warn its customer about the risk of fraud. I cannot say that first direct ought to have done more as, though it identified there was a scam risk with the payment, it didn't know for sure that Miss M was actually falling victim to a scam and neither was it reasonable for it to conclude that possibility was more likely than not.

In other words, I cannot say first direct was on notice that Miss M was the victim of fraud such that it should have declined to make the payment. So, I think it acted fairly by providing the warnings it did.

I've also seen evidence that first direct contacted the receiving bank on the same day the scam was reported and that no transactions debited the receiving account after the time Miss M first reported the fraud.

So, while I know there has been substantial correspondence in relation to the delays in recovering those funds, no action by first direct could have led to the recovery of more money.

Customer service

Finally, I've considered the customer service provided to Miss M. I've reviewed a limited number of call recordings, Miss M's testimony and the bank's records.

I am of the view that first direct's initial response to the claim ought to have been better. I've heard the very first call Miss M had with the bank and don't think that the call handler dealt

with the call with sufficient care and urgency in the circumstances. They ought to have explained exactly what steps they would be taking – including logging the fraud claim and contacting the receiving bank straight away. Miss M was understandably distressed at the idea that nothing would happen until the following day (even if, in fact, first direct did contact the receiving bank that day).

There also appear to have been times when first direct did not call Miss M back when it ought to have done which, given the amount of money involved, inevitably caused Miss M distress.

I do note the considerable delays in returning Miss M's funds from the beneficiary account, but much of this delay appears to be due to the receiving bank itself and, possibly, their attempts to trace funds. While first direct might have been more proactive in its pursuit of the money, I don't think it caused any unnecessary delays.

I realise this will be of little consolation to Miss M, but I think first direct should pay her £150 in compensation to reflect the poor service provided.

My provisional decision

I'm minded to uphold this complaint in part and instruct HSBC UK Bank Plc to:

- *Pay Miss M £150 in compensation.*

First direct agreed with my provisional decision. Miss M, now represented by a firm of solicitors, didn't. I've summarised their response below:

- The fraudulent correspondence between the fraudsters and Miss M was very sophisticated and it would have been difficult to spot that the emails received by her weren't genuine. This level of sophistication hasn't been properly taken into account when considering Miss M's actions.
- Miss M's solicitors were extremely busy during this period due to the stamp duty holiday and the sale was close to collapse due to the number of sales the solicitor was dealing with. Many of its staff were working from home and both calls to Miss M's solicitor, as well as to its office, often went unanswered. So, it wasn't fair to suggest that verifying the details over the phone was an easy step to take.
- Neither had Miss M been informed that she could contact the main office for account details or been provided with any guidance about how to do this. The Call was the first time she'd ever been advised that verifying the account details in this way would be necessary.
- Email was the dominant form of communication between Miss M and her solicitor. It was unsurprising that her calls and voicemail went unanswered and Miss M reasonably assumed her solicitor was in a meeting and too busy to answer.
- It was reasonable for her to believe that the email she received during the Call was a response to the missed calls and voicemail she had left. That email provided all the

confirmation Miss M reasonably believed she required.

- Miss M did not have any doubts about the legitimacy of the transaction itself, but rather whether her solicitor would want to be called.
- To be effective, a warning, as a minimum must meet all the criteria set out in the Code, namely to be understandable, clear, impactful, timely and specific.
- The bank's reference to the account details being received unexpectedly (particularly at the outset of the call) as well as other types of scam, including those involving HMRC, made the warning less specific, timely and impactful.
- A warning should be effective for a particular customer – but the warning didn't take into account Miss M's personal characteristics – including her age and lack of knowledge of scams of this type. She was also suffering from stress and sleep deprivation at the time, which again hasn't been taken into account.
- The warning lacked enough detail to be effective – it should have gone further to explain the specifics of this type of scam.
- First direct, with its expert knowledge and training, could have put a stop to the transaction until they were satisfied that the full risks had been understood. Instead it continued with the payment based on the 'shared belief' that the account details had been confirmed over email.
- Miss M only understood that it was important not to make a mistake when entering the account details, not that there was a risk of fraud. And, she had no reason to doubt the bank details, particularly as the adviser could confirm they belonged to the bank she believed she had to pay.
- The discussion around Confirmation of Payee only confused Miss M and had first direct had such a system in place it would have been able to identify that the name on the account didn't match that of the solicitors.
- Overall, the warning failed to meet several elements of the definition of an Effective Warning under the Code.

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.

As noted by Miss M's representatives, I've already accepted that the scam would have been very difficult for Miss M to detect based on the emails alone and her belief that the correspondence was genuine up to the point of the Call was reasonable.

Yet, during the Call, Miss M was given new information. She'd been advised that there was a risk of fraud and the steps she needed to take to avoid that risk. Given the amount involved here, I can't agree it was reasonable for her to proceed with the payment without completing the steps the bank advised. Doing so was a risk, a risk that Miss M acknowledged.

While I don't doubt her solicitors were busy and clearly Miss M normally communicated with them by email, confirming the account details over the phone was not an onerous or impractical step to take. Miss M tried to call her solicitor and requested a call back via email. Both actions indicate that she believed the prospect of speaking to her solicitor was both reasonable and realistic.

Neither can I agree that the one-line email she received during the Call ought to have provided her with any reassurance. If anything, it showed that the solicitor was available to

communicate with her (if only by email) and the failure then to respond to Miss M's subsequent email should have only caused further concern.

I know there were time constraints here, but the payment did not need to be made immediately and Miss M did have the opportunity to take the steps the bank advised. I'm not persuaded, as Miss M's representatives argue, that she didn't have any concerns about the legitimacy of the payment during the Call. The steps she took to try and contact her solicitor, as well as both her comments and tone at points in the Call all indicate a certain amount of doubt. While I accept she thought it more likely than not the account details were correct, particularly as they were for the bank she (albeit mistakenly) believed she had to pay, given the risk of fraud was specifically mentioned several times during the Call (and by Miss M in the email to her solicitor), I'm satisfied this risk was understood by her.

Unfortunately for Miss M, I'm also satisfied that it was her wish to have the payment made, despite the risk, rather than the impracticality of contacting the solicitor over the phone that led her to instruct the bank to make the payment without a verbal confirmation of the account details having taken place.

In order to provide a specific warning, it is necessary for the bank to first identify the purpose of the payment. It is reasonable then for it to ask questions about scams which might be relevant to that type of payment, as well as try and ensure that the customer has not been asked to mislead the bank.

As such, it was appropriate and necessary for first direct to cover off, not just email interception scams, but also other scams involving property and those where a customer might be asked to deceive the bank. So, I can't agree that by not focussing exclusively on email interception scams (as well as asking whether the account details were obtained unexpectedly) the warning, taking into account the conversation as a whole, was materially less specific, timely or impactful.

In fact, after asking questions about other scams, the adviser correctly identified the main risk here and was able to reinforce the warning later in the call – specifically focussing on the most likely risk.

While the warning *could* have gone into more detail about email interception scams, I don't think it was rendered ineffective by not doing so. Miss M may not have understood the technicalities of how a scam like this works. But, as I've explained, the warning only needed to be likely to affect the customer's decision making so that the prospect of the scam succeeding is reduced. The warning did that by explaining the specific risk, how to avoid it and what the consequences of proceeding with the payment were. So, I'm satisfied, taking into account the whole conversation, that the bank did enough to warn Miss M.

In relation to Confirmation of Payee, it was the receiving bank, rather than first direct which did not have the ability to check the account details – so this was outside of first direct's control. From the transcript quoted above, I'm satisfied the adviser's explanation of Confirmation of Payee was clear enough, after clarification, to be understood and Miss M's email sent during the Call supports this view.

This was clearly an extremely unfortunate set of circumstances. The fact the scam came so close to being prevented makes it all the more unfortunate. It's not possible to know whether an extra question, a slightly more detailed explanation of the scam or, perhaps, a little more reluctance by first direct to go ahead with the payment would have made a difference here. But I think that those suggestions go beyond what first direct was required to do – under the Code or otherwise and I've got no grounds, based on what it knew at the time, to say that it should have refused to carry out Miss M's instruction.

So, my decision remains unchanged from the provisional decision set out above and I will only be asking first direct to pay £150 in compensation.

My final decision

I uphold this complaint in part and instruct HSBC UK Bank Plc to:

- Pay Miss M £150 in compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss M to accept or reject my decision before 17 June 2022.

Rich Drury
Ombudsman