

The complaint

Mr and Ms F complain that HSBC UK Bank Plc trading as First Direct won't refund money they transferred to a fraudster.

What happened

The investigator has set out the background to this complaint at great length, so I won't repeat it all here. Briefly, Ms F was contacted out of the blue by someone claiming that she still held shares in a company which had been bought out over a decade before by a U.S. firm. The caller claimed that someone was looking to purchase the shares in order to control 51% of the company.

Over the following few months Mr and Ms F spoke to several people (claiming to represent various intermediaries) and a number of requests for money followed. Initially they had to pay £5,170 for a non-disclosure agreement and insurance, then £63,000 to buy 'warrants' attached to the shares, then £55,977 made over two payments for U.S. taxes. Mr and Ms F doubted the legitimacy of the request to pay taxes and were only persuaded to part with the funds after Mr F had a lengthy phone conversation with the callers. First Direct spoke to Mr and Ms F twice before releasing the second payment and once before releasing the third payment.

When a final request for money followed – this time for bank charges and legal fees, Mr and Ms F knew they'd been the victim of a scam and reported the matter to First Direct. They didn't think the bank had done enough to question them during the three conversations that had taken place before the payments were released.

First Direct, in response to Mr and Ms F's complaint, said that as the payments they made were international, they couldn't be considered under the "CRM Code" that Mr and Ms F had referred to. It also said that it had done everything it could to try and prevent the scam but that Mr and Ms F were determined to go ahead and appeared knowledgeable about the activity they were undertaking. It also said that all it could do was to try and recover the payments from the banks which received them (attempts that were ultimately unsuccessful).

Mr and Ms F referred the matter to our service and one of our investigators upheld it in part. They thought that First Direct hadn't done enough to question the payments Mr and Ms F made and, had it made further enquiries, given a better warning and explained the practical steps they could take to check the legitimacy of the investment, the loss to Mr and Ms F would have been prevented.

However, they also thought Mr and Ms F had a role to play in what happened, so they recommended that First Direct pay Mr and Ms F 50% of the second, third and fourth payments, as well as £100 in compensation to reflect the distress and inconvenience caused.

Mr and Ms F agreed to the investigator's view. First Direct didn't agree, in summary it said:

- It didn't think any intervention would have made a difference to Mr and Ms F's

- decision to go ahead with the payments.
- It was unreasonable for Ms F to believe that she held shares in the company without checking her own records or asking for proof from the fraudster.
- Ms F failed to carry out basic checks and the offer made by the fraudster was too good to be true, so Mr and Ms F should bear the full loss.
- Mr and Ms F had far more knowledge of warrants than First Direct's advisor.
- The fact Ms F said she had worked for the company in which it was claimed she held shares and Mr F said that he was an ex-finance director were powerful factors in convincing the advisor that they were financially sophisticated customers.
- Mr and Ms F spoke confidently about the scheme and gave plausible answers to the questions asked – there was no hint that Ms F was actually unsure that she held the shares at all.
- The responses from Mr and Ms F impeded the bank's ability to give an effective warning.
- It rejected the suggestion that the fact Mr and Ms F had been asked to sign a non-disclosure agreement should have been a red flag to its advisor.

Despite further clarifications from our investigator, no agreement could be reached. So, the case was passed to me for 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.

There's no dispute that Mr and Ms F authorised these transactions and that means that under the Payment Services Regulations 2017 and the terms of their account they are presumed liable for the loss in the first instance.

However, taking into account the law, regulator's rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I consider First Direct should fairly and reasonably:

- Have been monitoring accounts and any payments made or received to counter various risks, including anti-money laundering, countering the financing of terrorism, and preventing fraud and scams.
- 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). This is particularly so given the increase in sophisticated fraud and scams in recent years, which payment service providers are generally more familiar with than the average customer.
- 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 decline to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

It is undisputed that First Direct did find the activity, from the second payment onwards, to be unusual. That's what prompted it to hold the payment of £63,000 until it could speak to Mr F.

Mr and Ms F have accepted that the intervention shouldn't have taken place any earlier but, for completeness, I agree that the first payment to the fraudsters wasn't sufficiently out of character or unusual that First Direct should have questioned it. Mr and Ms F's account statements show similarly sized payments in the months preceding the scam, so that payment didn't particularly stand out.

The key question in this case is whether First Direct did enough during the two calls that followed and, if they'd done more, whether this would have prevented Mr and Ms F's loss.

Much has been made by First Direct of the apparent financial sophistication of Mr and Ms F and the scam itself. But, at its core, this was a simple scam. The most obvious feature (which First Direct did pick up on to a limited extent) was that Mr and Ms F were paying money in order to receive money back. In fact, by the time of the £63,000 payment, they had already done this and were complying with a second request for more money. That fact was not revealed during the call, but neither did First Direct ask about the purpose of the first payment.

There were also other reasons to be concerned. Underneath the apparent financial complexity, there was another well-known feature of investment scams – the fraudsters claimed to already have a buyer for Ms F's shares – someone that would buy them at an inflated price (a price which First Direct believe was too good to be true). While the specific price isn't mentioned by Mr F – he does mention that there is an offer to purchase the shares at a significant mark-up, which I think ought to have been enough for First Direct to be concerned. This is another common tactic employed by investment fraudsters and, again, something the bank should have been alive to. I appreciate that this fact was shrouded in a degree of plausibility – that Ms F already held the shares. But, I'd expect First Direct to be able to pick up on these key features and ask targeted specific questions as a result

But, on the whole, I don't think this happened. First Direct only obtained the name of the recipient, and doesn't establish who any of the other businesses involved are, including the name of the business that Ms F apparently held shares in. First Direct points to the implausibility of Ms F still holding shares in a company that had ceased to exist years before, but it was also in a position to identify this fact and didn't. It also doesn't question why the payment is going to a seemingly unrelated third country.

It asked whether Mr and Ms F had 'searched the company online' and checked whether the company was 'registered', but without really explaining what was meant by these questions. Presumably the latter was designed to establish whether the company was registered with a professional or regulatory body somewhere – but the advisor didn't enquire as to *how* they'd been able to confirm the legitimacy of several companies based in two different countries.

First Direct also asked how the company had contacted Ms F. Again, this presumably was an attempt to establish whether Mr and Ms F had been cold-called (which they had), but when a vague answer was received, the advisor did not follow up to establish how they were first contacted or whether this contact was expected.

Crucially, in my view, there were two calls before the £63,000 payment was released (and, it appears, a further review of all the information provided before the payment was released). Even accepting that the information provided by Mr and Ms F in the first call might have been somewhat, and to some extent reasonably, beyond the comprehension of the advisor, they had the opportunity to consult colleagues, reflect on the answers given and, in the follow up call, ask more targeted questions based on the previous conversation and the concerns that ought to have arisen from it. Largely that didn't happen – the second conversation involved more questions but, as noted, the questions were either too general or, when unclear or very short answers were given, the advisor simply moved on.

I don't think First Direct did enough during the calls. Its questions were not specific nor targeted enough – particularly in relation to the checks that Mr and Ms F claimed to have carried out, which First Direct ought to have known were inadequate.

For example, Mr and Ms F mention that the business they are dealing with have a website and that the number they've been called on matches that which is listed on the website. I think comments of this nature illustrated, despite the claims of Mr and Ms F, that the checks they had done were not sufficient and, perhaps, that they didn't know what checks they ought to be doing.

First Direct largely didn't give any advice about what effective checks Mr and Ms F should have done before making the payment. Neither, despite having identified the risk, did it really bring to life or provide a specific warning about what this kind of investment scam might look like. Instead it essentially assumed they knew what they should do to establish the legitimacy of the payee.

Had it elicited further information from Mr and Ms F – particularly around the names of the other businesses involved, then I think this would have given it serious cause for concern (despite the supposed non-disclosure agreement, the conversations don't suggest that Mr and Ms F wouldn't have revealed the names of the other businesses involved, if asked).

Simple checks that the bank could have done while on the phone or between the calls would have shown that there was a warning about the intermediary involved, which was published on the FCA website in November 2020. A few simple internet searches would have also revealed that the contact details for another business apparently involved in the transaction didn't match that of the genuine website – a clear indication the business had been cloned.

Even more concerning, the address of the 'transfer agent' would have been revealed to be a shop in the third country. These are all searches that could have been conducted while (or after) speaking to Mr and Ms F, so I don't think it is an onerous suggestion that they should have been carried out, at least when the bank's concerns had not been allayed following the first call. In the alternative, I don't think it would have been unreasonable for the bank to have declined to make the payment until it was satisfied that Mr and Ms F had made specific checks to ensure that they were dealing with a genuine company.

Had Mr and Ms F been confronted with this information or carried out those checks themselves, it's difficult to see how they would have continued with the payments. So, I think First Direct did miss an opportunity to prevent the loss of the second payment onwards.

I accept this is a finely balanced matter and I recognise the difficult position the bank was in here. That position was not made any easier by Mr and Ms F who omitted crucial information that would have helped the bank identify the scam. I'm not entirely convinced this was as a result of confusion about what the bank was asking and is likely to have been motivated by a desire to make this payment quickly.

Taking that into account, as well as the overall plausibility of the scam, I think that Mr and Ms F should bear some responsibility for what happened. I think a fair deduction is 50% here – that takes into account both the role they had in what happened and the relative asymmetry between the expertise of the bank and Mr and Ms F.

I'm afraid that I've found the scenario presented to Mr and Ms F to be simply implausible. Ms F doesn't appear to have done anything to check whether she actually held the shares and doesn't appear to question the sudden, unexpected contact. Neither did Mr and Ms F question the obvious red flags – the fact they hadn't been informed of the need for a second payment after making the first, the fact their money was going to a third country and the fact that the offer sounded a bit too good to be true.

What is more, as I've already set out, the answers they gave to First Direct were unhelpful, if not evasive. I would have expected Mr and Ms F to explain how surprised they were to

receive contact out of the blue about long lost shares and how they believed the shares had already been sold. And, they appear to have answered other questions for the purposes of expediency, rather than accuracy. I'd expect a reasonably prudent individual to enquire as to what checks they ought to have carried out and how to go about this (if nothing else to confirm that the checks they had done were sufficient). So, for these reasons, liability from the second payment onwards should be shared equally.

I'm satisfied with the attempts the bank made to recover the funds. There was a slight delay in trying to recover the money. But, in relation to the payments in December 2020 and January 2021, the receiving bank confirmed that the funds had already been withdrawn by the time the scam was reported. For the later payments, after an initial response saying it would not return the funds, the receiving bank failed to respond to further requests. So, I can't see that an earlier attempt to recover the money would have made any difference.

In relation to compensation, I think that the £100 recommended by the investigator is fair in the circumstances. I've noted that Mr and Ms F failed to receive promised call backs on occasion and I recognise the impact of the scam not having been prevented at the time, but I've also taken into account the role Mr and Ms F had in what happened.

Finally, in relation to interest, it seems more likely than not that the money sent to the fraudsters would have remained where it was, so I think interest should be paid at the rates paid by the accounts from which the money came. I understand the money came from both other HSBC / First Direct accounts and from external accounts. Evidence of the interest rate on the external accounts can be provided separately to First Direct.

My final decision

I uphold this complaint in part and instruct HSBC UK Bank Plc trading as first direct to pay Mr and Ms F:

- 50% of the second, third and fourth payments - £59,488.50
- Simple interest per annum on 50% of the second, third and fourth payments at the originating account rates from the date of each payment to the date of settlement
- £100 compensation

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms F and Mr F to accept or reject my decision before 14 October 2022.

Rich Drury
Ombudsman