DRN-3670635

The complaint

Mr and Mrs F complain that HSBC UK Bank Plc will not refund the money they lost when Mr F fell victim to a cryptocurrency investment scam.

As Mr F has taken the lead on this complaint, I will refer primarily to his submissions in my decision. I intend no discourtesy to Mrs F by doing so.

What happened

Mr F was interested in cryptocurrency. He explains that a work colleague had bought some and that whilst he didn't know much about it, he thought it was a good thing to get involved in. He came across a cryptocurrency trading platform online. Mr F can't remember for sure whether he first saw this platform advertised in a newspaper but thinks that he did. I shall refer to this platform as E.

Mr F explains that he signed up for an account with E and that he started to play around with small sums, *"just to see what he could do"*. He says when he logged into E, he could see his profit was increasing. He explained he received a phone call from a representative of E saying he was doing well and offering him a free broker service. Mr F agreed and explains there was an onboarding process that felt legitimate, as he needed to complete application procedures such as providing a copy of his passport.

Mr F says that a broker called him. He recollects that he was *"charming"*, *"well spoken"* and *"very friendly".* He explains they communicated over the phone and by email on a number of occasions. Acting on the broker's advice, Mr F set up an account with a legitimate cryptocurrency exchange and then followed the broker's instructions to send the cryptocurrency he'd purchased to a wallet address that the broker gave him. In total, Mr F sent £41,900. Mr F made payments from the joint HSBC account into his account at the cryptocurrency exchange. He sent £7,000 on 11 February 2019, followed by £7,100 on 22 February 2019, £6,800 on 27 February 2019 and a final payment of £21,000 on 8 May 2019.

Unfortunately, Mr F wasn't interacting with a genuine investment company. He was really interacting with fraudsters that had created a fake trading platform showing the investments Mr F thought he had made along with profit.

Mr F first became aware he had been the victim of a scam when a friend he'd introduced to the platform tried to make withdrawals and was unable to do so.

Mr F later reported the situation to HSBC, but it turned down his claim for a refund. Unhappy with the bank's position, Mr F made a complaint. In summary, he said that HSBC had extensive experience compared to his level of knowledge and awareness of cryptocurrency investing and that the bank should have done more to protect him.

HSBC considered the complaint but did not uphold it. In its final response letter, HSBC highlighted that it had called Mr F on 11 February 2019 to ask him about the payment he was trying to make at that time, and he confirmed it was genuine. HSBC said it did not question any further payments Mr F went on to make to the same beneficiary because he'd confirmed it was his own account. HSBC also said it was not upholding the claim because Mr F had made these payments for speculative investment that he was looking to gain from. Mr F referred the complaint to this service. He wanted to try and retrieve the bitcoin he'd been tricked into sending on.

HSBC provided its file to us and said it was unclear why the bank would be held liable when Mr F transferred money to another account in his own name that he had control of. The bank said Mr F should complain to the cryptocurrency exchange instead. It said the first payment had flagged for additional checks to make sure the payment was genuine and set up by the customer. It said none of the following payments met the parameters within its fraud detection systems to flag for additional checks.

Our Investigator looked into the complaint and recommended that it should be upheld. He explained that the Lending Standards Board Contingent Reimbursement Model Code that was set up to provide protection for customers that fall victim to APP scams did not apply, but explained that HSBC also has to be on the lookout for, and help to prevent, payments that could involve fraud or be the result of a scam. He was persuaded that the payments Mr F was making represented a change to the operation of the account. He pointed out Mr F didn't usually make such large payments and thought the bank should have done more to talk to him about the key features and risks of cryptocurrency scams when it spoke to him on 11 February 2019.

He pointed out that HSBC knew Mr F was sending money to a cryptocurrency exchange, but it didn't give him any information about how to spot a cryptocurrency investment scam. He was persuaded Mr F wouldn't have gone ahead with the payment if he'd known about the risk of cryptocurrency investment scams and what to check to try and protect himself. He didn't think Mr F had acted unreasonably or that it would be fair to say he ought to bear some responsibility for the loss. He thought the scam was sophisticated and highlighted some of the features that had persuaded Mr F that he was dealing with a legitimate business. He recommended that HSBC should refund all of the money that Mr F lost to the scam, along with 8% simple interest from the date each transaction debited his account to the date of settlement.

HSBC didn't agree. It said Mr F appears not to have carried out proper checks on the merchant, the payee or the area of investment and felt there was *"no indication that Mr F carried out any research whatsoever"* to satisfy himself this was a legitimate investment opportunity. It said it could not have provided Mr F with anything more than a warning about investment scams in general because there was no credible evidence that the merchant or payee were operating a scam at the time of the payments. It thought it was unlikely Mr F would have changed course as a result of this warning. It said that *"Mr F's conduct and his clear contributory negligence should be reflected by a percentage reduction of at least 50% on any refund."*

Our Investigator took this to mean that HSBC was offering to refund half of the loss. Mr F said he was desperate to recover any of the money and asked whether he could end up with nothing if he didn't take it. He asked if HSBC would pay interest on a partial refund. Our Investigator contacted the bank to clarify.

HSBC asked our Investigator if he was revising his view. It added that if the bank had told Mr F to check that the firm he was paying was FCA regulated, it would not have uncovered any concerns because he would not have checked for E, he would have checked for the legitimate cryptocurrency exchange, which has a limited FCA regulation for some activities.

Our Investigator explained that even though the money was moving to Mr F's own account with a cryptocurrency exchange, it didn't mean it was going to be safe. He thought HSBC had or ought to have had a good enough understanding of how these scams work - including that the consumer often moves money to an account in their own name before moving it on again to fraudsters. He didn't think it was fair of HSBC to assume that customers are not at risk of financial harm when sending money to accounts in their name.

HSBC said it had not made any offer on the case and was instead seeking further clarification on the Investigator's view. It felt the view ignored that many cryptocurrency investments are legitimate and not scams and said that cryptocurrency investment scams were not as prevalent in 2019.

As no agreement could be reached, the Investigator arranged for the complaint to be referred to an Ombudsman. He notified both parties of this on 11 August 2022.

My further investigation

When the complaint was referred to me, I had further questions for both sides.

I explained to Mr F that we would not be able to recover the cryptocurrency that he had unwittingly lost control of and restore it back to him. I asked him questions about his investment experience and about the modest 'tester' payments of £2 and £100 that he'd initially made. I also identified the funds ultimately lost to the scam had originated in an investment ISA and asked Mr F if he still held the account and how it had performed since the time of the scam. I indicated that it could be possible that the funds wouldn't have grown if they had stayed where they were because of external market conditions and I wanted to explore that further. I explained to Mr F that I did not want to make any assumption that the funds would not have gained without asking him for his perspective on that.

Mr F responded and confirmed he did still have some funds in the ISA. He said that some of the funds he invested in have grown since the time of the scam. He explored whether it would be possible for the ISA provider to simulate how the ISA would look now if the funds lost to the scam had still been invested, but ultimately this was not possible. I explained to Mr F that any redress that takes a long time to work out and implement would not be workable in practice.

I also contacted HSBC to ask whether it had a preferred method for calculating fair and reasonable redress when funds originated in an investment ISA, such as modelling to Mr F's account or using a HSBC comparable product, or whether it considered it was more pragmatic to pay 8% simple interest because of how complicated it could be to accurately work things out.

HSBC responded to say that it hadn't requested an Ombudsman's decision and that it was awaiting a response to the points it had raised about the view. I responded to the bank and addressed the points it said remained outstanding. I explained I considered HSBC had a far superior knowledge of what cryptocurrency scams can look and feel like. I said it was well known that cryptocurrency scams involve buying cryptocurrency from a legitimate exchange and then transferring it to wallet details provided by a third party. I explained how potential losses are reasonably foreseeable to HSBC because of its knowledge of how scams like this operate.

HSBC then asked if I was minded to uphold the complaint in full or partially. It pointed out that Mr F had previously accepted a partial offer. It repeated its point about cryptocurrency scams not being as prevalent in 2019 and asked why I believed the bank ought to have been concerned that the customer was sending money to another FCA regulated firm in 2019.

I responded to explain the FCA and Action Fraud had published warnings about cryptocurrency scams in mid-2018, which is months before Mr F fell victim to this scam. I asked the bank again for its comments on whether it considered there to be a feasible way to reconstruct what would have happened to Mr F's funds had they remained in the investment ISA.

HSBC replied and said no allowance had been made for contributory negligence and I ought to recognise Mr F's own contribution to the scam. It said the Investigator had put forward a proposal that the bank refunds 50% of the loss and that Mr F's contributory negligence accounts for the other 50%. It also wanted to know if I was applying current standards to a set of events which took place in 2019.

The bank then said that if I made an immediate final decision, it would not represent a fair process. It said I had spoken to Mr F to obtain further evidence, including detail relevant to contributory negligence, which had not been fully shared with the bank. HSBC wanted a proper opportunity to comment on it and suggested that I make provisional findings before any final decision is made.

I explained to the bank that our Investigator's view contained a section entitled *"Did Mr F act reasonably in the circumstances"* so it was not correct to say that contributory negligence had not been considered. I pointed out that the complaint was with me for a decision because the bank ultimately does not agree to the view our Investigator reached and that I could issue a final decision on the same basis if I arrived at the same conclusions and for the same reasons. I enclosed a copy of my email exchange with Mr F, which did not raise any new points that the bank had not been given the opportunity to ask when it investigated. I explained that when considering if Mr F has been contributory negligent, I am considering whether Mr F's actions or inactions fell far below the standard expected from a reasonable person. This involves considering the sophistication of the scam, the environment created by the fraudsters and whether a reasonable person would have thought this was legitimate. I added that I was still exploring whether the proposed interest award on the redress is feasible and appropriate and urged the bank to provide any further comments or information specifically on this point.

HSBC responded to say Mr F fell considerably short of what would be expected of a reasonable person by not carrying out adequate checks on E. It referred to my email exchange with Mr F and suggested that when he stated *"I really do believe that if HSBC had have mentioned the word Fraud to me or given me some indication that I could be a victim to fraud, I would have definitely been more thorough and checked the company",* he was acknowledging that he did not carry out research on the company before parting with significant sums of money. It said that even if Mr F had carried out brief and rudimentary internet searches, he would have come across poor reviews and suggested he acted carelessly by paying across large sums towards a speculative investment without having seen any tangible return.

It concluded by saying a reasonable person would have at least conducted internet research and as a result of Mr F's failure to do this, it was not fair and reasonable for him to be refunded in full. It made no comment about the interest award our Investigator proposed and indicated that it would await to hear from me.

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.

It's not in debate that Mr F has fallen victim to a particularly cruel scam. Fraudsters tricked him into believing he held an investment that was growing, when in reality he had given away cryptocurrency worth a considerable amount of money. Mr F made all of these payments before the Lending Standards Board Contingent Reimbursement Model Code that was set up to provide protection for customer that fall victim to APP scams came into force. So I have considered whether HSBC fairly and reasonably has any responsibility to refund some or all of the money that Mr F transferred from his HSBC account to his account with a cryptocurrency exchange.

The starting position at law is that banks and building societies are expected to process payments and withdrawals that their customers authorise them to make. There's no debate that Mr F made these payments himself. This means they were authorised payments, even though Mr F did not intend for this money to go to fraudsters.

But, taking into account the law, regulators rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I consider HSBC 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 (amongst other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks and building societies are generally more familiar with than the average customer.

- In some circumstances, irrespective of the payment channel used, have taken additional steps, or made 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.

Whilst HSBC's first obligation is to follow Mr F's payment instructions, the bank should be on the lookout for out of character account activity which can indicate that a transaction could involve fraud or be the result of a scam. If a payment instruction is unusual, HSBC should intervene and ask more about the reasons for making the payment before processing it.
I think this is good practice, whether the loss occurs from the HSBC account or at some later point in the payment journey. Although HSBC has pointed out the funds were transferred to an account in Mr F's own name, this does not absolve the bank of its responsibility to intervene if it had grounds to believe its customer was at risk of financial harm from fraud. Mr F's losses, though not arising from the initial transfer, ought to have been within the contemplation of, and reasonably foreseeable to, HSBC.

Against this backdrop, I've considered whether HSBC should have identified that Mr F was potentially at risk of falling victim to fraud when he made these payments, or otherwise done more to protect him.

Having done so, I consider the payments Mr F was making were out of character for the way the account typically ran, and that HSBC ought to have intervened. I've looked carefully at Mr and Mrs F's account statements in the lead up to the scam. Although the account is used frequently, there are clear patterns to the spending. The account is predominately used for paying regular bills and day to day retail spending. Against this backdrop, it's not surprising that HSBC flagged the first payment Mr F tried to make. A transaction of £7,000 to a new payee was unusual.

If a bank suspects that its customer might be the victim of a potential scam, it should intervene and ask questions about the transaction. HSBC has said that it wouldn't have been able to give a scam warning specifically targeted to the risks of cryptocurrency investment scams because there was no credible evidence that E or the cryptocurrency exchange were operating a scam at the time of the payment. In the bank's notes, it says that it complied with its obligations to prevent and detect fraud when it called Mr F on 11 February 2019 to query the payment he was trying to make and he confirmed that payment to be genuine. But having listened to the call HSBC had with Mr F, I'm not satisfied HSBC went anywhere near far enough in its questioning and as a result, missed the opportunity to stop Mr F from falling victim to a scam.

The call is approximately two minutes long and during the first minute, Mr F is completing the bank's security processes. I've included an extract of the relevant part of the call recording below:

HSBC: I see a transfer out £7,000 that is going out to Coinbase account, is that a [inaudible] transfer?

Mr F: Yes it is, yes

HSBC: Okay is it going out to your own Coinbase account?

Mr F: Correct, my own

HSBC: And err, did you receive any calls from anyone who has asked you to make any such payment from your account today?

There is around five seconds of silence on the line before Mr F replies.

Mr F: Err, no, what…what do you mean?

HSBC: Err did anybody call you claiming to be HSBC or BT or any other company who has asked you to make any such payment?

Mr F: No

HSBC: Okay. Thank you so much for confirming that Mr F, so after a few more checks from our side your payment will be released today.

Mr F: Okay thank you. Bye.

HSBC: You're welcome, bye bye.

The bank did not ask Mr F any open questions about the payment he was trying to make, and it did not probe any of his answers. It did not know any of the circumstances surrounding the payment and it did not take sufficient steps to find them out. One of the only pieces of information it had to go on was that Mr F was sending money to a cryptocurrency exchange and as I have already explained earlier in my decision, I don't think it was reasonable for HSBC to assume that this meant the money Mr F wanted to send there was not at risk of financial harm from fraud.

I accept the bank's point that not every transaction connected to cryptocurrency is automatically a scam. But we expect banks to be aware of cryptocurrency scams and be mindful that customers can be directed to buy cryptocurrency from a legitimate company and send it on. The bank missed a clear opportunity to identify a potential scam risk and it ought to have done more to satisfy itself that Mr F was not at risk of falling victim to a scam of this nature.

HSBC has suggested that cryptocurrency scams were not as prevalent at the time that Mr F made these payments and that we are applying the standards as they might be today to past events. But I do not agree. Both the FCA and Action Fraud had published warnings about cryptocurrency scams in mid-2018, which is something the bank ought to have been well aware of by the time Mr F fell victim to this scam. In addition, Mr F wasn't an experienced cryptocurrency investor and he'd not been given a cover story. I see no reason why he wouldn't have spoken freely about what he was doing and how he'd got into it had the bank asked him more questions. I'm also persuaded that the information he would have shared, such as the fact he'd been telephoned and offered a free broker service and that he was following the broker's instructions, would have aligned with the common features of this type of scam. On balance, I am persuaded that an appropriate intervention from HSBC would have prompted Mr F to reflect on what he was doing and stopped him from making the payment. I don't think Mr F would have consciously taken a risk with such large sums of money. He only did so because he thought he was following the advice of a professional. I consider Mr F would have taken heed of the information if HSBC had provided it and that the scam would have been uncovered as a consequence. It follows that I consider that HSBC didn't do enough to protect Mr F when he was transferring his money to a cryptocurrency exchange.

I have thought carefully about whether Mr F should bear some responsibility for his loss by way of contributory negligence (which might justify a reduction in compensation). And overall, I don't think he should. Mr F fell victim to a highly sophisticated and well-orchestrated scam. As with many scams of this type, the fraudsters employed an array of tactics to persuade prospective investors that the company was legitimate.

I can see, with the benefit of hindsight, there were steps Mr F could have taken that might have revealed the fraud at an earlier stage. It can be easy, in the cold light of day and when you have sufficient knowledge about how scams like this unfold, to note what those steps could have been. But I don't think the bank has placed appropriate weight on the environment created by the fraudster. Mr F has explained that he spoke to the broker on the phone and over email. Speaking to the same person repeatedly over an extended period of time builds trust. The screenshots Mr F has provided of E's website (which HSBC had the opportunity to ask him for when it investigated) further support Mr F's position that E's operation was slick. I can see how a lay person that isn't expecting to be scammed would have reasonably assumed that the trading platform was legitimate.

Although HSBC has identified other checks that Mr F could have done, I am not persuaded that the fact that he did not undertake these checks means he has contributed to the loss that he went on to suffer to such an extent that he should be held partially liable for it. I think a reasonable person could similarly have been persuaded to invest in what, on the face of it, appeared to be a good investment opportunity at a time when cryptocurrency was rapidly increasing in value. By saying that, I am mindful that Mr F was not told that he was going to receive a guaranteed profit. From what I have to go on, it seems more likely than not that the trading platform was replicating the genuine movements in the cryptocurrency markets at that time.

Overall, I think HSBC should have done considerably more than it did before processing the payments Mr F made. Had it done so, I think it's more likely than not the scam would have been uncovered and he would not have lost this money. In the particular circumstances of this complaint, I consider Mr F to be a blameless victim. I don't think his actions fell below what a reasonable person in his position would have done.

I've thought about what fair compensation might be in the specific circumstances of this complaint, being especially mindful that the money lost to the scam came from Mr F's investment ISA and would have more likely than not remained there had the scam been uncovered sooner. I have asked both Mr F and HSBC for its perspective on how best to put Mr F back in the position he would have otherwise been in. It's difficult to say for sure what the cost to Mr F has been as a result of not having these funds to use. Mr F provided as much information as he could about how his ISA funds have performed since the time of the scam but remodelling what the account's position would have been now is a complicated process, at odds with our role as an informal dispute resolution service. HSBC has had ample opportunity to provide further commentary in relation to this point, but as it did not agree that it was responsible for Mr F's loss, it ultimately did not engage.

Having looked at everything, I think our Investigator's proposed approach of awarding 8% simple interest per year is fair and reasonable in the individual circumstances of this complaint.

Putting things right

In order to put things right, HSBC should now:

- Refund the money that Mr F lost as a result of the scam - £41,900

- Pay Mr F interest on that amount at 8% simple from the date of each payment until the date of settlement – less any tax lawfully deductible

My final decision

My final decision is that I uphold this complaint and direct HSBC UK Bank Plc to pay Mr F and Mrs F the redress I've outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F and Mrs F to accept or reject my decision before 22 February 2023.

Claire Marsh
Ombudsman