

The complaint

Mr T complains that HSBC UK Bank Plc won't refund money he lost when he was the victim of a scam.

Mr T is represented by a firm that I'll refer to as 'C'.

What happened

In 2016 Mr T was the victim of an investment scam offered by a firm that I'll refer to as 'R'. Mr T and his wife had inherited funds from his mother-in-law and he came across R after looking for better interest rates on the internet – with R appearing near the top of the search results. And, after browsing R's website, he found a guaranteed savings plan most promising – which, for a minimum 12-month term, offered a 4.9% interest rate per annum.

Mr T and his wife thought about the investment opportunity for several weeks and decided to proceed. He spoke with R and was told the investment would provide dividends of £200 per month on top of the yearly interest. R gave Mr T instructions to pay the £50,000 investment across five payments, which he did:

Date	Type	Amount
28 September 2016	Faster payment	£10,000
29 September 2016	Faster payment	£10,000
30 September 2016	Faster payment	£10,000
2 October 2016	Faster payment	£10,000
3 October 2016	Faster payment	£10,000
	Total:	£50,000

After making the payments, Mr T remained in contact with R and was able to access his account showing the savings plan (assuring him it was legitimate). Around the beginning of November however, he received a call from a financial exchange firm – which he recalls was the same firm R claimed was facilitating the savings plan. This firm advised Mr T that they thought he'd been scammed and sent letters confirming this. Mr T was startled at being told this but, while he grew suspicious, he received his £199.05 payment from the investment plan on 9 November 2016 as expected (thereby making his loss £49,800.95).

Mr T nevertheless asked R whether he could withdraw the £50,000 and was told it would arrive in ten working days. The funds weren't received and, at this point, Mr T realised he been scammed. Although HSBC have no record of this, Mr T has said he contacted them in December 2016 to report the scam but he was advised they couldn't help.

C complained to HSBC, on Mr T's behalf, in September 2022 about these payments. In short, they said:

- Unbeknown to Mr T, R was a cloned firm. The website Mr T browsed appeared professional and genuine as it contained information such as R's company number, a

Financial Conduct Authority (FCA) caveat and a detailed 'About Us' section. R's company address also showed it was a UK based firm.

- The scammers cloned a legitimate firm and all correspondence and software appeared genuine. Mr T spoke with several members of R who likewise came across professional and created a corporate like aura, as well as reinstating everything found on their website. R weren't pushy and they allowed Mr T time to deliberate the offer before committing.
- Mr T checked companies house and R was registered as active. This, along with the above, gave him a reasonable basis to believe the firm – and investment opportunity - was genuine.
- HSBC failed in their duty of care to protect Mr T from this scam. The payments were for significantly more than Mr T used his account for and being made to a new payee. And so, HSBC should've recognised them to be unusual and intervened – making basic enquiries and asking probing questions. All payments however were debited from Mr T's account without any intervention or warning received from HSBC.
- Had HSBC stepped in and asked more probing questions, the customer wouldn't have proceeded with making the payments. To settle the complaint, Mr T would accept reimbursement of the monies lost.
- In addition to raising the matter with HSBC in December 2016, Mr T also reported the matter to Action Fraud and his local MP. He therefore took appropriate steps to try and mitigate his loss once he knew he'd been scammed.

HSBC rejected the complaint. They explained they'd notified the beneficiary bank of the scam allegation, asking them to review the situation and where possible return any remaining funds. But, as the payments were made before 28 May 2019, they're not covered by the Contingent Reimbursement Model (CRM code) and so they wouldn't provide a refund.

C referred Mr T's complaint to the Financial Ombudsman. Our Investigator thought the complaint should be upheld. She thought HSBC should've stopped the first £10,000 payment and enquired with Mr T about what it was for before releasing it. If this had happened, she considered it likely HSBC would've warned Mr T about investment scams. And although a Financial Conduct Authority (FCA) warning about R being cloned wasn't published until after the scam payments were made, it's likely a scam conversation would've prompted Mr T to check the FCA register as to whether R was an authorised firm, which they weren't. As this was contrary to what R said on their website, Mr T would've recognised it to be a scam.

Because of this, our Investigator didn't think Mr T would've proceeded with making the payments and so they should be refunded (less the £199.05 credit). She also didn't think the amount should be reduced due to contributory negligence on Mr T's part, as she didn't think the returns appeared too good to be true for someone who wasn't an expert in investments.

C confirmed Mr T's acceptance of our Investigator's recommendation. HSBC didn't agree, and so the matter has been passed to me decide.

HSBC added:

- Mr T came across the scam from an internet search but there's no explanation about what comparative searches he carried out to establish if it was a genuine investment.

And the 4.9% interest rate offered, along with monthly dividends of £200, on a £50,000 investment was the equivalent of an annual return of more than 7%. Given the low Bank of England base rate at that time, an investment providing this rate of return with no risk was too good to be true.

- A reasonable person wouldn't have invested £50,000 on a speculative investment within less than a week.
- The payments happened in 2016 but the standards against which their actions are to be assessed were different than they are today. The payments predate the introduction of the British Standards Institute code of practice (PAS 17271: Protecting customers from financial harm as result of fraud or financial abuse), on which the Financial Ombudsman often relies upon. The suggestion they ought to have automatically flagged a transaction that was higher than Mr T had previously made, for an unspecified past period, appears to assess this complaint by reference to more recent standards.
- Even if they'd spoke with Mr T, they don't accept it would've stopped him investing. It is clear Mr T was taken in by persuasive scammers and he would more than likely have preferred what they had to say rather than a generic warning from themselves. And they could've only warned Mr T generally about the risks of investments as the FCA warning about R being cloned hadn't yet been published.
- They also noted further reasons why Mr T would've likely proceeded:
 - Mr T's complaint submission explains he deliberated with his wife for several weeks before contacting R and then dealt with them for six days before starting to make the payments. This would've meant he was convinced by the investment and would've assured HSBC, had they spoken with him, that he'd considered it carefully.
 - Mr T received a telephone call from the financial exchange firm telling him he'd been scammed. At this point, the FCA warning was available. Notwithstanding this warning, Mr T didn't apparently accept it was a scam until mid-November 2016 when he didn't receive the funds from R. Given that the warning from the financial exchange firm would've been far stronger than what they could've given, Mr T didn't accept it was a scam until a later stage. Therefore, it's far more likely he wouldn't have responded to a generic warning from his bank.
- An important consideration is Mr T's own conduct and whether he can be found to have caused, or at least contributed to, his own losses. They refer to:
 - Section 1C(d) of the Financial Services and Markets Act 2000 and *"the general principle that consumers should take responsibility for their decisions"*.
 - Section 53(d) of the Financial Services (Bank reform) Act 2013 that sets out *"the general principle that those who use services provided by payments systems should take responsibility for their decisions"*.

And so, as noted above, the investment as presented was too good to be true and there isn't any evidence to show Mr T carried out comparative searches on the returns and investment arrangement presented to him. Combined with Mr T not acting cautiously, this was not reasonable conduct.

- It appears Mr T ignored warning signs in favour of generating unrealistic returns, paying over large sums without properly ensuring they were towards a legitimate arrangement. A reduction therefore of at least 50% should be applied to any refund as a result – as, even where it is found HSBC may have missed an opportunity to provide a warning, that doesn't absolve Mr T of all responsibility

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.

The background to this complaint is well known to both parties and so I'll only refer to some key events here.

I've thought about the CRM code which can offer a potential means of obtaining a refund following Authorised Push Payment (APP) scams. But the CRM code didn't come into effect until 28 May 2019 and doesn't apply retrospectively. This means, as Mr T's payments were made before this, they're not covered under the CRM code. I've therefore considered whether HSBC should reimburse Mr T under any of their other obligations.

In broad terms, the starting position in law is that a bank is expected to process payments and withdrawals that their customer authorises them to make. Here, it isn't disputed that Mr T knowingly made the payments from his HSBC account. I appreciate Mr T was tricked by the scammer as he thought it was a genuine investment opportunity. Nevertheless, I'm satisfied the payments were authorised by Mr T. So, under the Payment Services Regulations 2009 and the terms of his account, HSBC are expected to process the payments and Mr T is presumed liable for the loss in the first instance.

However, taking into account the law, regulatory rules and guidance, relevant codes of practice and good industry practice, there are circumstances where it might be appropriate for HSBC to take additional steps or make additional checks before processing a payment to help protect customers from the possibility of financial harm from fraud.

At which point, I'm aware HSBC has questioned the standards of which these payments are being assessed. And they've correctly pointed out that the payments predate the introduction of the British Standards Institute code of practice PAS 17271. But, while I've not considered these payments against this, I have taken into consideration the following:

- Regulated firms, like HSBC, are required to conduct their 'business with due skill, care and diligence' (FCA Principle for Businesses 2) and to 'pay due regard to the interests of its customers' (Principle 6).
- Firms have had a longstanding 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)
- The Financial Services Authority (the predecessor the FCA) released a thematic review paper in 2012, 'Bank's defences against investment fraud – Detecting perpetrators and protecting victims'. This set out non-exhaustive examples of good and poor practice found when reviewing measures taken by banks to counter financial crime. And I'm satisfied this paper, along with SYSC 3.2.6R, is of relevance to sending banks. This, in my view, is shown in the paper as it considered banks' efforts to counter fraud where the

customer is the victim, in light of the regulatory obligation to counter the risk that regulated firms might be used to further financial crime – including fraud.

I'm therefore satisfied that HSBC ought to have been monitoring accounts to counter various risks including preventing fraud and scams. To do this, HSBC should've had systems in place to identify unusual transactions, or other signs, that its customers were at risk of fraud. And carried out additional checks before processing a payment or, declined the payment altogether, to help protect customers from the possibility of financial harm from fraud.

So, the starting point here is whether the instructions given by Mr T to HSBC (either individually or collectively) were unusual in relation to his typical account activity.

Having looked at Mr T's account usage before the scam occurred, it was typically used for low value day to day spending – transactions below £100. There were a few exceptions to this but, in the 12 months prior to the scam payments, no transactions exceeded £1,000. The first £10,000 payment Mr T made to the scammers on 28 September 2016 was therefore significantly greater than how he typically used his account. And given the payment was being made a new payee, I think HSBC ought to have identified it as unusual and that Mr T was potentially at risk of financial harm from fraud. So, I think HSBC should've held the payment and spoken with Mr T before releasing it.

Had HSBC done so, I think it's likely Mr T would've explained the purpose of the transfer – that being for investment purposes. At which point, given HSBC have a greater understanding of investment scams and their prevalence, it would've been reasonable for HSBC to have questioned Mr T about it further. And, while I wouldn't have expected HSBC to have given investment advice, I think this conversation ought to have gone beyond a generic warning as HSBC has suggested. Instead, I think HSBC should've given appropriate warnings to Mr T about the risk of investment scams and tailored their questioning and advice to Mr T based on his specific circumstances.

Having given this careful thought, I think this would've involved HSBC asking Mr T how he came across the investment opportunity and what checks he'd carried out to ensure R was a legitimate firm. While Mr T had checked companies house, I think appropriate questioning would've included whether he'd also checked the FCA register to see if R was an authorised firm (thereby ensuring his investment funds received the relevant regulatory protection). As I have no reason to think Mr T wouldn't have answered this honestly, I think he would've told HSBC he hadn't checked the FCA register. At which point, I consider it would've been reasonable to expect HSBC to have recommended Mr T do so before proceeding with the investment (and making the first payment).

I understand HSBC don't think an intervention would've made a difference as they consider Mr T would've put greater reliance on what he was told by R. And that he was already convinced by the investment as he'd deliberated over it with his wife for several weeks. I've thought about this but I disagree. I think Mr T's deliberation demonstrates a cautiousness regarding the investment opportunity. And so, while he was sadly tricked by the scammers, I think it's likely he would've taken advice from his bank seriously.

I note HSBC has also suggested that Mr T's actions, after being notified by the financial exchange firm he'd been scammed, show he would've likely proceeded with the investment even if they'd spoken with before releasing the payment(s). This is because Mr T didn't initially seem to accept the investment was a scam until mid-November 2016 – and any warning given by the financial exchange firm would've been far stronger than what they could've provided. While I accept Mr T may not have fully accepted he'd been scammed immediately after being contacted by the financial exchange firm, I think this was

understandable in the circumstances. I consider it was reasonable for Mr T to try to withdraw his funds to confirm this suspicion. And so it was only at the point the funds weren't received, and he lost contact with R, that Mr T could be sure he'd been scammed. It follows that, had HSBC recommended to Mr T that he should check the FCA register to see if R was an authorised firm, I think it's likely he would've done so before proceeding with the first payment.

Upon checking the FCA register, Mr T would've become aware R wasn't an authorised firm and therefore unable to undertake regulated activities - including providing investment advice. This would've put Mr T on notice that R, and the investment opportunity they were offering, weren't legitimate. Because of this, I think it's reasonable to assume Mr T wouldn't have proceeded with making the first payment or the following four payments that followed. I therefore consider HSBC could've prevented Mr T's loss occurring.

As HSBC has pointed out, Mr T likewise had a responsibility to protect himself from the scam. And so, I've thought about whether he did enough here.

Mr T found R after carrying out an internet search to find better interest rates for the inheritance funds he and his wife had received. HSBC question what comparative searches he carried out and argue that the returns offered by R were too good to be true at that time. So, they think Mr T didn't act reasonably by proceeding with the investment – particularly by investing the full £50,000 in such a short period of time.

I can't be sure what comparative interest rate searches Mr T undertook at the time. But while I acknowledge HSBC's point regarding the high return being offered, I don't think it was so excessive that an inexperienced investor would realise it wasn't legitimate. I think the returns offered by R were at a level where it would've appeared plausible to Mr T, and thereby an attractive option. Because of this, I don't think I can fairly conclude the investment would've been seen by Mr T as being too good to be true (and given him cause for concern).

I've also considered that R cloned a genuine firm. And so, unfortunately, although I think Mr T acted reasonably by checking companies house, this wrongly assured him he was dealing with a legitimate firm. And, as the FCA warning hadn't yet been published, Mr T wouldn't have had reason to think otherwise. Furthermore, the various people Mr T dealt with at R came across as extremely professional, and Mr T likewise found their website and correspondence to be genuine. And so, I think it was understandable why Mr T felt he was dealing with a legitimate firm and decided to proceed with the investment. Given Mr T was satisfied of R's legitimacy and attracted by the investment opportunity offered, I don't think it was unreasonable for him to invest the full £50,000. I'm not persuaded Mr T had sufficient reason to doubt the security of the funds he was investing at that time (without the intervention from HSBC).

I've thought about what other checks Mr T could've done, including whether he could've checked the FCA register - without the direction of HSBC - to see if R was an authorised firm. But, having done so, I wouldn't necessarily expect an inexperienced investor to know about the FCA register or that investment firms must be authorised to carry out regulated activities. And so, after taking everything into consideration, I don't think Mr T was grossly negligent or negligent to an extent that it would be fair and reasonable to reduce the award based on contributory negligence in the circumstances of this complaint.

It follows that, to put things right, I think HSBC should refund Mr T £49,800.95 – that being the £50,000 he invested less the £199.05 credit he received.

My final decision

My final decision is that I uphold this complaint. I direct HSBC UK Bank Plc to refund Mr T the £49,800.95 he lost from the scam.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 29 March 2023.

Daniel O'Dell
Ombudsman