

The complaint

Company S is unhappy that HSBC UK Bank Plc wouldn't reimburse the money S lost due to an authorised push payment scam.

What happened

The background to the complaint is well known to both parties and so I won't repeat it at length here.

Briefly, as I understand it, a fraudster hacked into the email account of a director of S and sent several emails to a staff member asking them to make payments, to different payees. Six payments were made over a period of ten days, totalling £200,000. The first three payments went to two different beneficiary accounts with Bank A. The fourth payment went to an account with a building society. The final two payments went to another beneficiary account with Bank A.

HSBC reimbursed S the first four payments. It however did not agree to pay interest on the reimbursed sum. It also declined to reimburse the fifth and the sixth payments. The bank said that when S attempted to make the fifth payment to a new payee, it called the payer (S' employee who was authorised to make the payment) and warned them about the risk of directors' emails being hacked and fraudsters impersonating as directors. The bank said that it advised the payer to contact the director, but they still went ahead with the payment. So, it shouldn't be held responsible for any loss to S following its warning.

I issued a provisional decision (which forms part of this Decision). I said, in summary:

- Company S's claim isn't eligible to be considered under the Contingent Reimbursement Model code ('the CRM code'). This in turn means that I don't have to specifically consider whether or not the exceptions under the CRM code applied in this instance.
- HSBC has accepted that it could have done more to help prevent the loss to S in relation to the first four transactions, and has reimbursed the sum of £100,000 to S. In the circumstances there isn't anything further for me to add.

As regards paying interest on that sum, the relevant question is the opportunity cost of the lost funds to S. In this case, I cannot be certain about the cost to S of being deprived of the money because it might have used the funds in a variety of ways. Without any compelling reason in this case to depart from our usual approach, I consider it fair and reasonable that HSBC pays S simple interest on the sum it reimbursed at 8% p.a.

- In relation to the fifth and sixth payments (totalling £100,000), I am not persuaded that HSBC should reimburse them. When S made the fifth payment (for £50,000), HSBC intervened and spoke to the payer. The bank's agent questioned the payer about the payment. On being told that the payment was on the instructions of the director, the agent did alert the payer to impersonation scam - where a fraudster pretending to be a director instructs payments. The payer however firmly believed that the instructions were

genuine and asked the bank to go ahead with the payment.

I considered whether, at that time, the bank's agent ought to have insisted that the payer confirm the payment with the director over the phone. However, the payer did try to contact the director earlier in the day (for a different reason) but couldn't. So, I was of the view that the payer would most likely have advised HSBC that the director wasn't reachable. They would have reiterated that the payment was genuine and requested that HSBC go ahead with the payment. So, I didn't think that any bank's failure in this regard would have made a difference.

In relation to the sixth payment which happened the next day, I noted that HSBC intervened and spoke to the same payer. The payer again insisted that the payment was genuine. The bank then proceeded to allow the payment.

After taking everything into account and bearing in mind that the disputed transactions weren't eligible to be considered under the CRM code, I was of the view that it wouldn't be fair and reasonable to ask HSBC to reimburse the fifth and sixth payments.

- S had also asked that their legal fees in dealing with this matter be reimbursed. They said that they had to resort to legal help due to HSBC's approach in this case and that S wouldn't have been able to address our requirements without legal help. I noted that S was provided with referral rights to this service by HSBC. Thus, the company could have brought the complaint to this service – which is free of charge to them. In the circumstances I didn't think it is fair for me to ask HSBC reimburse S the legal fees it incurred in pursuing its claim / complaint.

S did not agree with my provisional conclusions. They said, in summary:

- They don't accept that they should not receive any reimbursement from HSBC in relation to the fifth and sixth transactions.
- In relation to the fifth transaction, when the payer said that they would email the director to confirm the payment, HSBC should have made it clear that it was vital that they call the director. Had it done so, the payer would have called the director, and this would have had a material effect on preventing the scam. Also, the bank should have picked up on the point that if it were too difficult for the director to speak by phone, how was it possible for him to email.
- Even if S were to accept the position that the telephone call from HSBC in respect of the fifth transaction was enough to have amounted to an 'Effective Warning', HSBC's approach on the sixth transaction was grossly insufficient. There was no warning provided at all during HSBC's call with the payer, let alone a warning that can be described as 'effective'.

It is accepted that a phone call was not made by the payer to the director when the fifth payment was made and that was in part due to the fact that the fraudster (appearing as the director) had represented that he could not speak that day. However, there was no such representations made by the director (the fraudster) to the payer on the day the sixth payment was made. Further, in the payer's emails to the 'director', they even referred to 'hoping' that the director hadn't been hacked or words to that effect. That indicates an increased nervousness that, had HSBC provided an 'Effective Warning' in relation to the sixth transaction, would more likely than not have prompted a call which more likely than not led to discovering the fraud.

The pattern of conduct from HSBC created an illusion of comfort to the payer. Because HSBC had allowed each preceding transaction to go through without concern, the payer was put further under the spell of the scam not only by the fraudster, but by HSBC also. Had HSBC specifically told the payer that they should confirm payment instructions with the director by telephone, the spell the payer was under would have been broken.

- Also, HSBC could have confirmed the position with a director of the company directly. What if, for example, the payer was a fraudulent employee sending the payment to themselves. In such a situation it would not have been an 'Effective Warning' to have called the fraudster themselves and instead it would have been appropriate to clarify the transaction with a director.

HSBC responded to say that it has nothing to add to the provisional 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.

Having done so, I am not persuaded to depart from the conclusions I reached in my provisional decision.

I am thankful to S for providing detailed submissions to support the complaint, all of which I have read and considered in their entirety. However, I trust that they will not take the fact that my findings focus on what I consider to be the central issues, and that they are expressed in less detail, as a discourtesy. The purpose of my decision is not to address every point raised in detail, but to set out my conclusions and reasons for reaching them.

- S has made references to HSBC not providing an 'Effective Warning'. As I explained in the provisional decision, I don't think that the relevant transactions are eligible to be considered under the CRM code. Therefore, some of the considerations specific to the CRM code don't apply here – as for example whether HSBC gave 'Effective Warning' as defined under the CRM code.

That said, I have reached my conclusions based on what is in my opinion fair and reasonable in the circumstances of the case.

- I remain of the view that when S made the fifth payment, HSBC did warn the payer about the risk of a director impersonation scam. However, the payer was quite clear that the payment was genuine and asked the bank to proceed. I also remain of the view that even if HSBC had recommended that the payer speak to the director, it's more likely that the payer would have advised HSBC that the director wasn't reachable and would have reiterated that the payment was genuine and requested that HSBC go ahead with the payment.
- S say that the situation was different when they made the sixth transaction on the next day. They say on that day the fraudster (pretending to be the director) made no representation that he was unavailable. Therefore, they believe that had HSBC advised the payer to call the director and confirm the payment, they would have done so but HSBC gave no warning at all. Therefore, they believe that HSBC should reimburse the sixth payment.

I am not persuaded by this. On the day of the transaction, it was the payer who first emailed the 'director' asking whether the additional £50,000 should be paid that day. Given the conversation with the bank the previous day and as the 'director' made no representation about not being available that day, the payer could have contacted the director over phone to confirm this. But they did not.

In fact, in a subsequent email that day, the payer told the fraudster: *"will now await the usual call from HSBC fraud department! They make you so paranoid so I hope your e-mail account hasn't been hacked and that this isn't a huge scam"*. This suggests to me that they had understood HSBC's warning about email intercept scam – in that the director's email could be hacked by scammers. But they did not call the director and continued to correspond via email.

As far as HSBC's action in relation to the sixth payment is concerned, the previous day the bank spoke to the payer during which it talked about the risk of impersonation scams. But the payer was adamant that it was a genuine payment. They said: *"I do understand. I do understand. I think from the tone of the email and the comments he made about somebody else in the office ... that nobody else would know about it ..it is a genuine .. I mean I know it is genuine I am convinced it is genuine"*.

During the conversation, the payer also let it be known that S would be making another payment the next day for £50,000. The payer said: *"And there will be another one of these tomorrow.... I'll warn you there will be another £50,000 tomorrow I have to pay"*.

Thus, on the next day, the payment was made to an existing payee and the bank was already told by the payer that they would be making the payment that day. Further, when the bank called to verify this payment, the payer said: *"Yes, I made the payment this morning. I made a similar one or exactly the same amount yesterday ... it is all legitimate .. I've checked it all.. the director told me to do it.. I had .. a conversation with somebody yesterday.. it is genuine.."*.

In broad terms, the starting position in law is that a bank is expected to process payments and withdrawals that a customer authorises it to make, in accordance with the terms and conditions of the customer's account. But that is not the end of the story. The bank also has an ongoing obligation to be alert to various risks in relation to the accounts with it.

Ultimately, it is a matter for the bank as to how it chooses to configure its fraud detection systems and strike a balance between allowing its customers to transact business and questioning transactions to confirm they are legitimate. In this instance, taking everything into account, including the conversations the payer had with the bank, I consider that HSBC broadly struck that balance. Therefore, I do not consider it fair to ask the bank to reimburse the fifth and/or sixth transactions.

- S has suggested that HSBC ought to have called a director of the company rather than the payer and has referred me to a hypothetical situation where the payer themselves could be making unauthorised payments. Firstly, that is not of course what happened here and secondly, I don't think there was anything suspicious that ought to have made the bank suspect fraud by the payer. So, I am satisfied that HSBC didn't do anything wrong in contacting the payer in this case.
- In reaching my decision, I have also taken into account the overall outcome in relation to this fraud, as there are multiple parties involved here (i.e., HSBC, Bank A and S). The relevant banks have borne 75% of the £200,000 that was sent to the fraudster, which means the ultimate loss to S is 25%. As I remain of the view that there was contributory

negligence on part of S, I consider this a fair and reasonable outcome overall.

My final decision

My final decision is that I uphold the complaint in part. In full and final settlement of the complaint, HSBC should:

- Pay interest at 8% simple p.a. on the £100,000 it has refunded. Interest should be paid from the date of transactions to the date of payment of the £100,000.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 17 March 2023.

Raj Varadarajan
Ombudsman