

The complaint

Mr W complains that HSBC UK Bank Plc trading as first direct (First Direct) won't refund the money he lost as a result of a scam.

Mr W has used a professional representative to bring this complaint to our service and they have made submissions on his behalf. For consistency, I'll refer to Mr W throughout.

What happened

Mr W fell victim to a cryptocurrency investment scam and was tricked into making five faster payments totalling £20,010 from his First Direct current account to an account he held at a cryptocurrency platform (that I'll call C). From there, Mr W converted his funds into cryptocurrency and sent it on to a scammer, purporting to be a broker working for an investment firm that I'll call N. From here on out I'll refer to the broker as 'the scammer'.

In March 2022, Mr W was looking for investments online when he came across an advert for N in an online newspaper article. He made contact with the scammer through the contact details listed in the advert. After speaking with a sales team he was referred to N's website which he later described as having several features mimicking that of a genuine company's website. He received a call back from an account manager (the scammer), who described how the investment worked. Essentially the scammer would trade on Mr W's behalf for a small commission and would teach Mr W how to trade at the same time, with the understanding that Mr W could withdraw his balance at any time. So, Mr W opened accounts with both C and N. The scammer used remote access software to gain access to Mr W's device supposedly in order to trade on Mr W's behalf. Mr W started off with an initial £10 payment on 11 April 2022 which was a start-up fee. Mr W then paid a further £1,000 towards the investment, which was subject to fraud checks by First Direct. Mr W spoke to First Direct by phone the same day and the payment was released.

Mr W was pleased with the growth in his investment. Although he says he wasn't told specifically what returns he'd generated, he was getting daily updates and could see the live trades as they took place. The scammer informed Mr W of different account packages with their Bronze Package requiring a minimum investment of £10,000. On 15 April 2022, Mr W transferred a further £9,000 towards the investment and again this payment was subject to a fraud check. Mr W spoke to First Direct by phone the same day during which First Direct says its agent tried to clarify who was advising Mr W and where his funds were going. It says it gave advice about the lack of regulation in cryptocurrency and the potential risk of investment scams, advising Mr W to be cautious. Following this call the payment was released.

As a Bronze Package customer, Mr W was passed over to another account manager who explained the best way for Mr W to access his money was to set up a savings account. To accumulate his savings, he needed to deposit the same amount he wanted to withdraw. So, he paid a further £2,000 on 27 April 2022 and a further £8,000 on 3 May 2022. First Direct says neither of these payments were subject to additional checks. However, I note from First Direct's contact notes that Mr W called First Direct on 27 April 2022 because he was concerned the payment would be picked up by the fraud team and confirmed it was a

genuine payment. First Direct hasn't supplied a copy of this call recording. Both of these payments successfully debited Mr W's account.

However, when Mr W tried to make withdrawals from his account with N, he was asked to make further payments to release the funds and he realised he'd been scammed. He then became aware of negative reviews online about N which he'd not seen when he initially researched them. He reported this to First Direct on 5 May 2022 and he was told that as he'd sent the funds to his own account with C, he'd need to speak to C to pursue the loss. Mr W says he did this, but C was unable to assist.

Mr W complained to First Direct about the decision to decline his claim, and it issued a refund of the first and second payments totalling £1,010. First Direct says it refunded the initial £10 payment as it didn't provide a warning for this, and it refunded the £1,000 payment as the advisor didn't ask enough questions on the call. But First Direct said Mr W ought to have conducted more due diligence and was likely enticed by the high returns he was promised. It felt it did enough to question Mr W about the third payment, and it had no reason to intervene on the final two payments as they were going to a known beneficiary.

The matter was referred to our service and our Investigator upheld the complaint in full. They thought that First Direct ought to have done more during the call on 15 April 2022 to break the spell Mr W was under and, had it done this, Mr W's loss would have been prevented. As our investigator didn't think that Mr W acted with negligence, they recommended he be refunded in full, together with 8% simple interest per annum from the date the payments were made until the date they would be returned.

First Direct continued to disagree, largely for the same reasons it relied on when it responded to Mr W's complaint. It said the phone call it had with Mr W was a detailed and thorough phone call and it would be unreasonable to expect the bank to do any more. As no agreement could be reached, 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.

Having done so, I'm reaching the same outcome as our Investigator and broadly for the same reasons. I'll explain why.

Mr W freely admits he carried out the transactions in dispute, albeit he was tricked into doing so. Under the relevant regulations, namely the Payment Services Regulations 2017 (PSR 2017), Mr W is responsible for transactions he has authorised.

Like the Investigator, I'm persuaded this case doesn't fall under the Lending Standards Board's Contingent Reimbursement Model (CRM) Code as the funds went to Mr W's own account at C and not to 'another person' – which is a requirement for a payment to be considered under the CRM Code. However, 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 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.

As First Direct has already refunded the first two transactions, I don't feel it necessary to comment on whether its interventions were proportionate to the risk associated with these payments. Instead, I've focused on the payments which First Direct has said it's not liable for.

First Direct did intervene on the £9,000 payment, as I'd have expected it to. This was not in keeping with the typical account usage. Prior to this payment, the largest debit Mr W had made was a £5,000 card payment on 22 March 2022 to a merchant he'd paid twice before over a period of two months. Therefore, I consider the £9,000 payment in question to be materially different to the previous transactions on his account. And this point doesn't seem to be in dispute given First Direct did attempt to make contact with Mr W and had a conversation with him.

Having listened to the phone call that took place on 15 April 2022, like our Investigator, I'm satisfied First Direct ought to have done more to break the spell Mr W was under. During the call, Mr W confirms he is making a payment of £9,000 to C. However, despite this, First Direct gave a warning about impersonation scams such as those where a fraudster pretends to be the bank or police. Although I recognise that customers can often be equipped with cover stories, as the payment was going to a cryptocurrency provider, I think the first identifiable risk here was a cryptocurrency investment scam. So, I'd have expected First Direct to have reacted to that information and tailored the questions and warnings around it.

The advisor went on to ask what prompted Mr W to make this payment and he explained he was entering into the cryptocurrency market. Again, whilst the scam risk presented here was a cryptocurrency investment scam, the advisor proceeded to ask Mr W questions about how he had obtained the payment details – a question relevant to email interception scams. Mr W then explained he'd been dealing with a company in London (N) and had already made an initial payment and was now increasing this. In response to this, First Direct gave a warning about email interception scams. So initially, despite Mr W offering up information which did point to the fact that he was subject to a cryptocurrency investment scam, such as stating he was investing in cryptocurrency, that a third-party company or agent was involved (N) but he was sending the money to C, and that he'd made an initial investment and was now increasing this; all of which are common features of this type of scam, First Direct didn't give a clear warning about cryptocurrency investment scams.

Eventually, First Direct steered the conversation towards the risks associated with cryptocurrency such as the lack of regulation and risk of scams, but I don't think its warning went far enough. The agent said:

“Again, just to make you aware we sometimes see where these investment scams come up where they convince you to send money to crypto – they don’t give you full access to the account and then they try to charge you more to release funds and things like that.”

This was just one feature of cryptocurrency investment scams, but one which wasn't completely relevant to Mr W. This warning didn't tackle any of the red flags Mr W had made First Direct aware of already in the call. Further red flags came to light as the call progressed, such as Mr W confirming he'd never used N before, not specifying what research he'd actually conducted, and explaining that as a 'techno dinosaur' he was following advice and regularly speaking with two advisors. I think this information ought to have given First Direct cause for concern that Mr W was being prompted to invest and essentially coached through this process, which is an extremely common feature of this type of scam. Also, his self-admittance that he was not skilled with technology, could've left him more susceptible to the manipulation that followed through use of remote access software which is also a prevalent feature of this scam type. Had it probed this further, it likely would have been able to establish that Mr W had also given the scammer access to his device, in order for coaching to be facilitated. Furthermore, the type of arrangement Mr W described during the call, was extremely unusual, for a legitimate investment. And the information he revealed, made it overwhelmingly likely that the situation Mr W was describing was a scam.

Taking the above into account, I'm persuaded that enough information had already come to light during the call to give First Direct serious concerns that Mr W was falling for a cryptocurrency investment scam. First Direct ought to have clearly warned Mr W that many of the details Mr W had relayed were common features in such scams and that there was a high risk to Mr W that he'd lose his money if he proceeded. I do accept that First Direct did go on to warn Mr W of the risks of proceeding, in the context of sending funds to the wrong account, or there being something wrong with the broker. And it did give a general warning about 'middlemen' being involved in cryptocurrency investment scams. But I'm still not persuaded this sufficiently brought to life the common features of this scam, in order to positively impact Mr W's decision making. Had First Direct really brought cryptocurrency investment scams to life and highlighted that what Mr W had described mimicked the typical traits of a cryptocurrency scams, it would've made the warning all the more relevant and personal to Mr W. I think this would've been much more impactful and would've put Mr W on notice that he was potentially falling victim to a scam.

Mr W showed throughout the call, and all calls he had with First Direct that he was happy to answer any questions asked of him, and welcomed the checks conducted by First Direct, even thanking the agents for their intervention. So, I have reason to believe that had First Direct probed further and gave a more specific warning, that Mr W would have likely positively engaged with this. Had First Direct warned Mr W against proceeding and set out how he might protect himself from cryptocurrency investment scams, such as only dealing with regulated and authorised brokers, and following the advice on the Financial Conduct Authority's website on investment scams, I think it's highly unlikely Mr W would have wanted to proceed. I say this because he later came to the realisation he'd been scammed when he had a slight feeling something wasn't right when being asked to pay to release his funds. This indicates to me he was not oblivious to risk and was paying due regard to the credibility of any requests made by the scammer. Overall, I'm satisfied that further probing and better warnings from First Direct, as it ought to have done, would've exposed the scam and prevented further loss.

I've also considered whether Mr W can be fairly considered partially responsible for his loss. I've considered what the law says about contributory negligence whilst also paying due regard to what I consider to be fair and reasonable in all the circumstances.

Having done so, I'm satisfied that Mr W should not share liability in this instance. Mr W is a self-confessed inexperienced investor. He explained he wasn't familiar with cryptocurrency, and from the phone calls I've listened to, he described himself as a 'techno dinosaur'. Taking these things into account, I've considered whether Mr W did enough to establish that the

investment he was entering into was a genuine one, or that he has acted with such a degree of carelessness that it would be fair and reasonable to say he ought to share in liability.

Mr W says he found the advert for N in a well-known online newspaper – or perhaps, unbeknown to Mr W, a convincing mock-up of the online newspaper, given what we know about how this type of scam typically operates. Mr W also explained N's website was professional in its layout with various tabs such as a regulatory section, a cookies policy, and an about us section. He was also able to see live trades through access to his own online account with N and could see charts and graphs of investments and their outcomes. Again, Mr W has not supplied evidence of this as he no longer has access to the site, but we know this to be a common feature of such scams, so I have no reason to doubt his testimony. And I'm sure this would have seemed quite compelling to Mr W, as an inexperienced investor.

Furthermore, he had built up strong rapport with the scammers, who he described as charismatic and knowledgeable, having daily conversations with them at times. Mr W says he initially wasn't made promises of specific returns, nor was he made any guarantees, which is true of the nature of the investment he was making. Though it's unclear whether Mr W conducted any in-depth research into N, other than searching N on the internet, I've found that prior to the payments he made, there were mostly positive reviews about N on a well-known independent review site, which likely would've contributed to his belief in N's legitimacy had he looked for these.

I've also considered whether, following the interactions Mr W had with First Direct, he ought to have done more to verify that he was making a legitimate investment. But I don't think that's the case here. As I've explained, I'm not persuaded the calls went into enough detail about what such investment scams look and feel like and instead focused on the regulation, or lack thereof, of cryptocurrency. Therefore I'm not persuaded the warnings First Direct gave put Mr W on notice that he was falling victim to a scam.

I do acknowledge that some of the features of the investment, particularly the returns Mr W thought he'd generated towards the end of the scam, didn't align with what I'd expect of a legitimate investment of a similar nature. However, taking everything into account, as well as Mr W's lack of experience, I don't think it would be fair or reasonable to attribute blame to Mr W in this case. That is to say, I don't think he should share in liability for his losses as a result of the scam.

My final decision

For the reasons I've explained above, I uphold this complaint against HSBC UK Bank Plc trading as first direct.

If Mr W accepts my decision, HSBC UK Bank Plc trading as first direct should:

- Refund the outstanding loss, which I calculate to be £19,000 (£20,010 sent less the refund of £1,010).
- Pay Mr W 8% simple interest per annum on that amount, from the date the payments were made until the date outstanding loss is refunded, less any tax lawfully deductible.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 23 November 2023.

Meghan Gilligan
Ombudsman

