

The complaint

Mr P is unhappy that HSBC UK Bank Plc trading as first direct (First Direct) won't refund the money he lost after he fell victim to an Authorised Push Payment (APP) scam.

What happened

The background to this complaint is well known to both parties and has been laid out in detail by our Investigator, so I won't repeat it all here.

But briefly, both parties accept that Mr P was the victim of a scam after he found a vehicle, advertised on a well-known auto trader website, that he was interested in buying. Mr P contacted the seller and agreed to pay a deposit, with the remaining balance to be paid on the day the vehicle was due to be delivered.

Mr P made the following payments;

27 July 2022	£2,395
28 July 2022	£10,797.75
29 July 2022	£10,797.75

But when it came to the day of delivery the vehicle didn't arrive. Mr P has said he then became more suspicious that he'd been scammed, when he searched on DVLA and could see that a MOT hadn't been carried out (which Mr P had arranged to be done with the seller). As well as this, Mr P then researched the seller and could see the company had only been set up a few days before. Unknown to Mr P at the time he had been dealing with fraudsters and had sent his payments to accounts the fraudsters controlled.

First Direct is a signatory of the Lending Standards Board Contingent Reimbursement Model (CRM Code) which requires firms to reimburse customers who have been the victims of APP scams like this in all but a limited number of circumstances. First Direct said that there were sufficient fraud measures in place when Mr P sent his payments. It deemed Mr P liable, as it said he could have taken more caution and carried out more checks. First Direct did contact the beneficiary bank (the bank to which the payments were made) in an attempt to recover the money Mr P had sent, but it was only able to recover £52.16, which it returned to him.

Unhappy with First Direct's response, Mr P brought his complaint to this service. One of our Investigators looked into things and thought it ought to be upheld. In summary, she didn't believe First Direct had fairly assessed Mr P's claim under the CRM Code. She said that First Direct presented a warning when the first payment was made, but she didn't think the warning was effective. Although she added that she didn't think First Direct needed to provide a warning for the first payment, as she didn't think it posed enough of a risk.

But she thought it ought to have provided a tailored warning for the second and third payments, which it didn't do. She thought the payments were so out of character that First Direct ought to have intervened and discussed the payments with Mr P before allowing them to be progressed, and her view was that if it had done so it would have made a

difference and prevented the scam. Our Investigator also concluded that Mr P had a reasonable basis for belief when making the payments.

As the bank disagreed with our Investigator's view the case has been referred 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.

In deciding what's fair and reasonable in all the circumstances of a complaint, I'm required to take into account relevant: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to be good industry practice at the time.

As I've mentioned above, the CRM Code provides additional protection for the victims of APP scams. I'm satisfied that the payments Mr P made fall within the scope of the CRM Code. But despite offering additional protections, the CRM Code includes provisions allowing a firm not to reimburse APP scam losses fully where the firm can establish that the customer failed to take sufficient care when making the payment (often referred to as the exceptions to reimbursement).

Under the CRM Code, a bank may choose not to reimburse a customer if it can establish that*:

- The customer made payments without having a reasonable basis for believing that: the payee was the person the Customer was expecting to pay; the payment was for genuine goods or services; and/or the person or business with whom they transacted was legitimate.
- The customer ignored an effective warning by failing to take appropriate steps in response to that warning.

*There are further exceptions outlined in the CRM Code that do not apply to this case.

When assessing whether it can establish these things, a Firm must consider whether they would have had a 'material effect on preventing the APP scam'.

So, in deciding the fair outcome for this complaint, I must first determine whether First Direct has established these exceptions to reimbursement can be fairly applied.

I agree with our Investigator that I don't think the circumstances of the first payment would have alerted First Direct that Mr P may have been at risk. The payment, while not insignificant, was not so unusual or out of character, when compared to his typical account activity that I think it ought to have caused First Direct concern that Mr P was at risk.

First Direct did provide a warning for the first payment. But, in any event, I'm not persuaded the warning was sufficiently specific or impactful to amount to an effective warning in line with SF1(2) of the CRM Code. While I acknowledge the warning does, at least in part, make reference to the type of scam Mr P was falling victim to, I'm not persuaded the warning and guidance was clear. The warning wasn't specific to the circumstances that Mr P found himself in and the start of the warning gives reference to a different scam type altogether.

I think the second and third payments Mr P went on to make, ought to have alerted First Direct to the potential that their customer may have been at risk. And in these circumstances, I would have expected it to provide Mr P with a warning for both of these payments. In not doing so, I'm not persuaded that First Direct has been able to establish that Mr P has ignored effective warnings.

I'm also satisfied that First Direct has not shown that Mr P lacked a reasonable basis for believing that the payments he made were for genuine goods or services. I say that because;

- Mr P had been able to communicate with the seller, through both phone calls and messages, and was able to ask questions about the car. He carried out a DVLA check and questioned why there wasn't a MOT. Following which I'm satisfied he was given a persuasive story, that a MOT would be completed ahead of the vehicle being delivered to him.
- Mr P was provided with legitimate looking invoices and has explained that the company had a professional looking website, adding to Mr P's belief that he was dealing with a genuine company.
- The price of the vehicle here wasn't too good to be true, as can often be the case in scams like this. An independent valuation website (rather than advertisements) states the car would be worth only a small amount more than the price Mr P agreed to pay. So I don't think the price Mr P agreed to pay was so good that it ought to have led him to have suspected things may not have been as they appeared.
- It's important to remember, when making an assessment of reasonable basis for belief under the CRM Code, that the customer's actions must be considered against what was happening at the time. That is to say that subscribers to the CRM Code like First Direct ought not look back on a scam with the benefit of hindsight. It would of course have been better if Mr P had check the company on Companies House before making the payment, and with hindsight he may have been more concerned that the MOT wasn't showing with the DVLA. But the fact that Mr P didn't do so here doesn't automatically mean that he acted unreasonably or that he lacked a reasonable basis for belief that he was making a legitimate transaction.
- I'm also mindful that the purchasing of cars without seeing them first is becoming increasingly common – something I'm satisfied HSBC is aware of - and so it wouldn't be fair to say that to do so – in and of itself – is to act unreasonably.
- HSBC has said Mr P received a confirmation of payee (COP) match for the first payment. Although Mr P was paying an individual here, rather than a company, I think the fact the initials of the individual matched those within the company name it is understandable why Mr P moved passed this and it didn't cause him any concern. Indeed I think the purpose of COP is more to alert consumers to 'no match' or 'partial match' situations, rather than for them to have concerns when bank account details match the name of who they are paying.

Overall I'm persuaded Mr P had a reasonable basis for believing that the payee was the person he was expecting to pay; the payments were for genuine goods or services and the person with whom he transacted was legitimate.

Should First Direct have done more to prevent the scam?

In addition, I think that First Direct ought reasonably to have done more to prevent the scam from the time Mr P made the second payment.

The payment was out of character for him, when compared to his typical account activity in the months leading up to the scam. It followed in quick succession to another, not insignificant payment, to a new payee. With this, I think there was enough going on that First Direct ought fairly and reasonably to have been alert that Mr P may have been at risk of financial harm.

Mr P isn't an expert in matters relating to fraud nor had experience in purchasing vehicles. So, had he been asked the purpose of the payment – for a vehicle, First Direct would have been in a position to provide him with what to look out for in relation to vehicle purchase scams. It could have stressed the importance of seeing the vehicle or obtaining further detailed information about the vehicle such as documents prior to making payment.

Importantly, I think that had Mr P been warned that fake companies and websites are set up and a common vehicle scam involves paying for a vehicle upfront with the promise for it to be delivered – and then for it not to arrive, Mr P would have taken steps to ensure he didn't fall victim to this type of scam. And I think it is reasonable to suggest that Mr P wouldn't have proceeded with the payment until he had carried out some further steps / checks and satisfied himself that everything was ok. So, I think an opportunity was missed by First Direct and the loss could have been prevented from the point Mr P made the second payment.

The relevance of this finding is that First Direct ought to have prevented the loss from the second payment. It follows that First Direct should pay Mr P interest at 8% simple interest per year from the date of loss (for payments two and three) rather than from the date it decided not to refund him under the CRM Code.

Overall I am satisfied that under the CRM Code, First Direct hasn't established any of the permitted exceptions to reimbursement apply. And I am also satisfied that First Direct could have done more to intervene on the second payment which would have prevented the loss.

Putting things right

For the reasons explained above, I think it's fair that HSBC UK Bank Plc trading as first direct should now;

- Refund Mr P the balance of the money lost through this scam, being the sum of £23,990.50 (less any sums already reimbursed or otherwise refunded) and;
- pay 8% simple interest per year on the amount of the first payment – calculated from the date HSBC UK Bank Plc trading as First Direct declined Mr P's claim under the CRM Code
- pay 8% simple interest per year on the amount of the second and third payments - calculated from the date of these respective payments.

My final decision

My decision is that I uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or

reject my decision before 19 October 2023.

Stephen Wise
Ombudsman