

## The complaint

Miss B complains that HSBC UK Bank Plc trading as First Direct (First Direct) says it won't refund her the money she lost through an Authorised Push Payment scam (APP scam).

## What happened

In July 2022, Miss B received a message through an instant messaging app from someone who referred to her as "Mum".

They said they'd got a new phone number and asked Miss B to update the contact information. I'll refer to this person as D. Miss B only has one child and so assumed the message was from her daughter. Unfortunately, and unknown to Miss B at the time, D was a scammer.

After a short conversation, D asked Miss B to help her with something. Miss B says this was something she's used to doing as her daughter has five children and often asks for help. D said they had an invoice that needed to be paid that day (it was after 8pm in the evening).

D said because they had a new phone it would take a couple of days for their online banking to be activated again. That meant they couldn't make the payment themselves. D asked if Miss B could pay it on their behalf, and they'd pay Miss B back as soon as their online banking was restored.

D provided the payment details (for a personal account in a third party's name). D said the amount due was £2,500, but Miss B explained the maximum she could afford to pay was £1,000. D said they'd try and explain that (presumably to the payee).

Miss B doesn't use online banking herself. She called First Direct to make the payment (doing so in the belief she was helping her daughter with an urgent payment).

### *Payment call — between Miss B and First Direct*

Miss B asked what her available balance was including her overdraft facility. She then asked if she could pay £1,000 (representing almost the entire available balance) to someone she hadn't paid before.

The agent asked if the payment was "*going to a person or a company*"? Miss B responded that she believed it was a private account.

She was asked what had prompted the payment, and explained: "*its my daughter, she's asked me to pay a payment because she's you know... then she's going to give it back to me in two days' time*".

First Direct asked "*did you receive her bank details face to face or by calling a telephone number?*" — Miss B replied "*face to face*"

The agent then verified the payee details matched the account (using the confirmation of payee system) and the payment was made.

### *Next steps*

After the payment was made Miss B tried to call the new phone number, but it seemed like the signal wasn't good and she couldn't hear the other person. Miss B says this wasn't unusual, her daughter has poor mobile service in her home. She didn't want to ring the landline as it was around the time her daughter's children would be being put to bed.

The next morning, Miss B called her daughter at home on her landline, and it came to light that this hadn't been legitimate. She notified First Direct that she'd been scammed. It attempted to recover her money from the beneficiary account, but none remained.

First Direct is a signatory of the Lending Standards Board's Contingent Reimbursement Model Code (the CRM Code). The CRM Code requires firms to reimburse customers who have been the victims of APP scams in all but a limited number of circumstances. First Direct said one of those limited exceptions applied here. It said Miss B had given the wrong answer when it had asked her how she'd received the payment details and this had prevented the bank from protecting her from the scam, such as by giving her a scam warning. First Direct said it did not need to refund Miss B.

In turn, two of our Investigators looked into Miss B's complaint. Both thought it should be upheld. They didn't think First Direct was entitled to apply an exception to reimbursement under the terms of the CRM Code. First Direct hadn't been able to establish that Miss B had made the payment without a reasonable basis for believing what she did, or that she'd ignored an effective warning given by First Direct. So First Direct should reimburse Miss B in full.

First Direct maintained its position. It was disappointed that it was being asked to refund Miss B. It said it had asked clear and unambiguous questions during its call with her about the payment. It had no reason to have doubted Miss B's answers. If Miss B had given the correct information, then the bank could have warned her accordingly. The bank had no reason to assume she might have been contacted through the messaging app. The bank hadn't done anything wrong and so it wasn't fair it was being asked to refund Miss B.

In light of this disagreement, I have been asked to reach 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 have reached the same outcome as our Investigators for largely similar reasons.

I've carefully considered First Direct's representations about why it was not at fault in the payment being made and so why it considers it shouldn't now need to refund Miss B. But the bank's representations do not persuade me to reach a different view. I will explain why.

The CRM Code provides significant additional protection to the victims of APP scams. While the code is voluntary in nature, First Direct is a signatory to the code, and as such has committed to assessing relevant APP scam payments in line with the provisions of the code.

I'm satisfied that the payment here falls within the scope of the CRM Code, and so Miss B benefits from the protections available under that code.

With this in mind, I've considered whether First Direct has fairly assessed Miss B's scam

claim in line with the provisions of the CRM Code.

First Direct says that it is not required to refund Miss B for the money she lost. It has told our Investigator that this position follows from Miss B's incorrect answer to its adviser's question, which it explains prevented it from protecting her from the scam that unfolded.

I understand what First Direct seeks to argue here. If the CRM Code did not apply to this payment, then that argument might have some merit.

But as I have explained above, I find that the CRM Code does apply to this payment, and put simply, the CRM Code requires APP scam victims to be reimbursed in full, except where any of a limited number of exceptions apply.

Those exceptions relate to the victim's actions and beliefs about the payment at the time of the scam. Where those don't apply, then the victim is to be reimbursed. That reimbursement isn't contingent upon whether the firm was at fault or could have prevented the scam from occurring.

Indeed, even if it could not have been possible for the firm to have prevented the scam and the resulting financial loss, under the provisions of the CRM Code, the firm will most often still be liable to fully reimburse the scam victim. To quote section R1: *"Subject to R2, when a Customer has been the victim of an APP scam Firms should reimburse the Customer."*

The relevant exceptions to full reimbursement are set out in the CRM Code at R2. If a firm seeks to rely on R2 as a reason not to reimburse a scam victim, then it needs to establish that one of the listed exceptions applies.

First Direct hasn't been clear in setting out whether it considers any exceptions apply (and if it does, then neither has it indicated which).

However, the exceptions are limited. Only three of the five possible exceptions listed under R2(1) could be relevant here. I will consider each of those in turn before turning to R2(2).

*Can First Direct fairly rely on any of the exceptions to full reimbursement under R2?*

Firstly, R2(1)(a) requires the firm to establish that:

*The Customer ignored Effective Warnings, given by a Firm in compliance with SF1(2), by failing to take appropriate action in response to such an Effective Warning [...]*

In the current instance, I don't think First Direct intends to argue that it gave Miss B an Effective Warning in compliance with SF1(2). Rather, it states it *would* have given Miss B an Effective Warning had she answered the agent's question correctly.

However, for this exception to be established, First Direct would need to, as a starting point, demonstrate that it provided an Effective Warning in compliance with the code. If it did not, then regardless of why it did not (whose fault that was) it cannot establish that a hypothetical warning was ignored. It cannot have been ignored, because none was given. It could never have been possible for Miss B to have failed to take appropriate action in response to a warning she did not receive.

Simply put, First Direct cannot rely on R2(1)(a) here.

Secondly, R2(1)(c) may only be applied where a firm can establish:

*In all the circumstances at the time of the payment, in particular the characteristics of the Customer and the complexity and sophistication of the APP scam, the Customer made the payment without a reasonable basis for believing that: (i) the payee was the person the Customer was expecting to pay; (ii) the payment was for genuine goods or services; and/or (iii) the person or business with whom they transacted was legitimate.*

While First Direct does not argue that Miss B made the payment without such a reasonable basis for belief, I have considered whether this might be a reason that the bank might choose not to reimburse Miss B.

But I am not persuaded First Direct could fairly seek rely on this exception. I am persuaded by Miss B's testimony that at the time she made the payment she was convinced she was interacting with her daughter about an urgent payment, and more importantly I think it wasn't unreasonable of her to have held that belief in all the circumstances at the time.

In saying that, I've taken into account that this wasn't an especially complex scam. Rather, its success was largely based on context and coincidence. In that context, the scam cynically exploited Miss B's natural desire to help her daughter. The apparent similarities to the genuine relationship between Miss B and her daughter lead me to find it was both plausible and persuasive for Miss B in the moment. I find this having given careful consideration to the messages Miss B received from D - and taken into consideration her further comments to First Direct and to our Investigator about what she thought at the time and why.

The scammer seems to have picked up on Miss B's lack of confidence with technology in the messages (such as in the exchange checking she'd been able to update the contact details). Miss B says it wasn't unusual for her to make and receive payments from her daughter — which is consistent with her account history in the twelve months prior to the scam.

I'm also persuaded by Miss B's explanation that she was used to helping her daughter, particularly because she recognised the demands presented by her daughter's five young children. Miss B says that meant it was usual for her and her daughter to mainly interact through messaging rather than a phone call. Further at the time of interaction she says she'd been aware it was near the children's bedtimes so a call to the house landline wouldn't have been welcomed.

Of course, there was little besides this context to validate Miss B's belief that D really was her daughter. However, all considered, I don't think she was unreasonable in holding that belief – that contextual coincidence operated against her. And critically, to show this exception could fairly be applied, the bank would need to demonstrate that Miss B didn't hold that belief reasonably. I don't find it has established this.

Therefore, taking all of the circumstances surrounding the payment into account, I am not satisfied First Direct can rely on this exception to reimbursement.

The final exception that could conceivably be relevant to Miss B's case is R2(1)(e):

*The Customer has been grossly negligent. [...]*

The CRM Code does not provide a specific definition of gross negligence. In line with the interpretation adopted by the FCA in its guidance document to the Payment Services Regulations I take the view that "gross negligence" is: *"a higher standard than the standard of negligence under common law. The customer needs to have shown a very significant degree of carelessness."*

I do not find this can be fairly applied here. As reasoned above, I have found the scam was plausible and persuasive to Miss B in the circumstances. I do not find she was very significantly careless in that respect.

I have specifically considered whether Miss B showed a very significant degree of carelessness in the answers she gave to First Direct's agent when she made the payment using telephone banking – in particular when she stated: 'face to face'. First Direct has provided the relevant call recording and I have carefully reviewed the overall interaction with this in mind.

In the context of the call, I'm not satisfied the importance of the question "*and did you receive her bank details face to face or by calling a telephone number?*" was made apparent to Miss B. The question is closed and seems designed to elicit a negative response. Neither option offered by the agent applied to Miss B.

I'm persuaded that with Miss B's desire to make the payment without delay, the time taken to reach this point in the call and her concerns about how she'd finance the payment, the significance of this seemingly innocuous question would not have been sufficiently evident to her at that very moment. By contrast, in the cold light of day, I see no reason to believe that Miss B would not have answered correctly — in rejecting both options she'd been given. But at the time, I don't think she was aware of why the answer mattered or the consequences of not pausing to think and give the most accurate answer she could.

So, I don't find Miss B was grossly negligent here – I don't find she was very significantly careless in the answer she gave. On the contrary, I find her answer understandable given the situation she was in at the relevant time, and in response to a closed question that didn't appear to offer her a valid option.

Neither do I find Miss B was very significantly careless in any other relevant respects. That means I don't find First Direct is entitled to rely on exception R2(1)(e).

For completeness, under section R2(2) the CRM Code contains a provision applying where:

*[...] during the process of assessing whether the Customer should be reimbursed, the Customer has acted dishonestly or obstructively in a material respect.*

I don't think Miss B was acting dishonestly in answering the agent's questions – at most she did so with a slight degree of carelessness, but I don't find this could fairly be classed as "dishonesty". In any event this clause cannot apply here. It refers to dishonest or obstructive acts occurring "*during the process of assessing whether the customer should be reimbursed*". Nothing I've seen suggests this is applicable here.

#### *What the CRM Code requires of First Direct*

Given that I find none of the exceptions to full reimbursement can fairly be applied in Miss B's case, it follows that First Direct should have fully reimbursed her (under provision R1 of the CRM Code). I therefore find First Direct was at fault here – it did not do so when it assessed her claim.

Miss B was able to mitigate some of the financial implications of the scam by borrowing from friends and family, so avoiding interest and overdraft charges she'd otherwise have incurred. But she was deprived of the money lost to the scam for longer than she should have been due to First Direct's failure to reimburse her in line with the requirements of the CRM Code. In all the circumstances, I therefore consider it fair for First Direct to now add interest to the sum she lost at the rate of 8% simple per year from the date it first declined to reimburse her

to the date of settlement.

### **Putting things right**

For the reasons set out above, I find it fair and reasonable in all the circumstances that Miss B ought to have been fully refunded under the CRM Code. I therefore direct HSBC UK Bank Plc trading as First Direct to:

- Pay Miss B the amount of the remaining loss, that being the sum of £1,000, within 28 days of receiving notification of Miss B's acceptance of my final decision; plus,
- Pay interest on that sum at the rate of 8% simple per year (less any tax properly deductible) calculated from the date the bank first declined to reimburse Miss B until the date of settlement.

### **My final decision**

I uphold Miss B's complaint about HSBC UK Bank Plc trading as First Direct as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 25 September 2023.

Stephen Dickie  
**Ombudsman**