

## The complaint

A limited company 'S' complains that HSBC UK Bank Plc didn't do enough to prevent the loss it suffered when it sent money to an HSBC account as the result of a scam.

S has brought its complaint through a representative. But for ease of reading, I'll mostly just refer to S and will ascribe the representative's comments to S itself.

## What happened

The detailed background to this complaint is well known to both parties. So, I'll only provide a brief overview of some of the key events here. In May 2020 S was the victim of an email interception scam. It intended to make a payment to one of its owners to repay a loan. But the scammer impersonated the owner from a very similar email address and provided different account details. So, when S made the payment, instead of going to the owner, it went to an account held with HSBC. The payment took place on 13 May 2020, was for €229,500 and was made from S' account with its own bank (which is based outside the UK).

About a week later the scam was discovered, and S reported this directly to HSBC, it was also reported to the relevant authorities. S' bank reported this to HSBC on 22 May 2020.

S approached our service and ultimately HSBC said it was unable to provide a refund. In summary it said that no funds remained in the account and there was no bank error. One of our Investigators considered the complaint. She recommended that the complaint should be upheld in part and that HSBC should pay S around £143,000 plus 8% interest. HSBC disagreed and asked for an Ombudsman to make a decision.

In July 2023 I issued a provisional decision in which I said:

*"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 intending to reach a different outcome compared to that of our Investigator. So, I'm issuing this provisional decision to give everyone a further opportunity to comment.*

*I'm satisfied that HSBC correctly followed its account opening process for the account that received money from S. I don't think there was anything at that stage that would have indicated that the account might later go on to be used in connection with a fraud or scam. So, I don't think HSBC could have prevented S' loss in relation to the opening of the account.*

*The account that received the funds was a sterling-based account and the €229,500 credited the account as £200,634.74 on 14 May 2020. HSBC have obligations to be alert to potential fraud, scams and the misappropriation of funds. They are also required to have systems and controls in place in relation to compliance, financial crime and money laundering. In particular the Financial Conduct Authority's (FCA) Systems and Controls Sourcebook (SYSC) includes that "A firm must take reasonable care to establish and maintain effective systems and controls for compliance with the 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).*

*Further SYSC guidance includes that “A firm should ensure that systems and controls include:… (4) appropriate measures to ensure that money laundering risk is taken into account in it’s day-to-day operation.” (SYSC 3.2.6G).*

*In its March 2016 paper “Financial Crime: a Guide for Firms” the FCA set out that “A firm must conduct ongoing monitoring of its business relationships on a risk-sensitive basis. Ongoing monitoring means scrutinising transactions to ensure that they are consistent with what the firm knows about the customer, and taking steps to ensure that the firm’s knowledge about the business relationship remains current.”*

*With the above considerations in mind, I’m satisfied that HSBC ought to have been monitoring its accounts and that this would include both incoming and outgoing payments. I think that the incoming payment ought to have flagged with HSBC for further scrutiny. I say this for the following reasons:*

- It represented a meaningful change in the way the account was operating.*
- It was an incoming international payment of a significant value.*
- The activity wasn’t in line with what would typically be expected given the information HSBC had gathered at account opening.*

*The combination of these factors should have led HSBC to block / freeze the account and to carry out an investigation to satisfy itself of the legitimacy of the payment.*

*And upon HSBC looking more closely at the payment, they would have seen that the beneficiary included in the information transmitted with the payment, most likely wasn’t the accountholder. I say this because the evidence S have provided from the sending bank show that one of S’ owners was recorded on the payment instruction and there is no obvious connection between this individual and the recipient accountholder. This ought to have been an immediate red flag. An incoming payment with a beneficiary name mismatch is something commonly seen with the movement of the proceeds of a fraud or scam.*

*There is evidence to show that HSBC did intervene in an outgoing payment on 19 May 2020 and as a result of this it spoke to its customer. I’ve listened to a recording of that call, but it is of limited value as it is primarily concerned with the outgoing payment that the accountholder wanted to make, rather than seeking an explanation for the incoming payment. But I think it does indicate that the accountholder would have engaged with HSBC and attempted to have provided an explanation.*

*However, I don’t think it’s likely the accountholder would have been able to provide a plausible explanation for the mismatch. I think HSBC ought to have asked to see evidence that its customer was the intended beneficiary of the incoming £200,000 payment and be satisfied of this, before releasing any of those funds. I’m also mindful that a co-owner of S reported this to HSBC on 21 May 2020, with a report from S’ bank coming the following day.*

*So even if the accountholder were going to try to falsify some evidence, I don’t think it’s likely that they would’ve been able to provide something that would have (1) been acceptable, and (2) which would have adequately explained the beneficiary name mismatch, prior to HSBC being on notice from S’ co-owner or its bank.*

*Overall, had HSBC done all it should, I think all of S’ funds would have remained in the recipient account, and that these would have been recovered and returned upon receipt of an indemnity from the sending bank.*

*In response to our Investigator's assessment HSBC have argued that S was negligent in sending the payment and ought to bear some responsibility for its loss, I've considered this. The points HSBC have raised include:*

- S didn't have proper processes in place to protect itself, despite being a corporate organisation and should have educated its staff on the risks of fraud.*
- S should have questioned the change in account details to a UK based account when its co-owner was primarily based in another country.*
- The payment was high value and it's not reasonable for S to have sent this without additional checks.*
- S' contention that the staff member was reassured because the funds were coming to the UK and an HSBC account is unreasonable.*

*S obtained a digital forensic report into the emails surrounding the scam. The evidence from that report suggests that the scammer inserted himself in an ongoing email thread between one of the co-owners and one of S' employees. There was a slight change in the email address used, with the addition of a few characters, something I accept could easily be missed.*

*When considering contributory negligence, I need to think about whether there was any reason for S to have had concerns when instructing the payment such that it should share responsibility for the loss it has suffered.*

*Some of the email exchange between S and the scammer took place after the payment had already been instructed. So consideration of those emails can't form the basis of an assessment of contributory negligence. The emails which seem to have prompted the sending of the payment say:*

*9 May 2022 Scammer to S – "Please hold the payment, our [own] bank I sent you is on lock down due to our government restrictions on covid-19 crisis. i will send you other active bank that is operational. Are you doing partial payment, Please confirm to me total amount you will pay so that i will know which of our bank to use. How much are you paying? Awaiting your reply..."*

*11 May 2020 S to Scammer – "We will pay 229.500,00 eur, we are waiting your instructions..."*

*12 May 2020 Scammer to S – "Thank you for your confirmation, as you said proceed payment of the 229.500,00 eur to my below account..." Details of the HSBC account were then provided.*

*S as an entity was incorporated to facilitate co-operation between its owners for a building project. The payment in question was the return of funds due to one of the owners following completion of the project. S' submissions on this point are that if the funds were requested to a country that would have stood out as being unusual, then they would have conducted further checks at the time. But as it was being sent to the UK and the owner had business interests across Europe, this didn't stand out as suspicious or unusual, particularly as the emails were part of the same 'thread' with only a small change to the email address. They've also said that at that time they had no knowledge or awareness of email interception scams and weren't given any warnings by their own bank when sending the funds.*

*I've thought carefully about whether I should make a reduction in award for contributory negligence, but I'm not intending to in the circumstances of this complaint. I have to keep in*

*mind that in May 2020 Europe was in the grip of the initial stages of the covid pandemic, with many countries in lockdown. As such, I don't think it's unreasonable for S not to have challenged covid as part of the reason for the change in account. At that time, many businesses (including banks) were restricting the level of service they could provide due to staffing concerns caused by lockdowns.*

*S have also explained that at the time their process was for a payment instruction to be prepared and for this to be signed off by a director before being submitted to their bank. As I've mentioned above this payment was being made upon conclusion of the project that formed the purpose of S' existence. And whilst I understand the point HSBC is making, I don't think S not having fully educated itself as to fraud and scams and putting a process in place to combat this amounts to negligence such that a reduction on that basis is fair and reasonable in these circumstances. I appreciate as the receiving bank HSBC wouldn't have been able to advise or provide education to S. There is no evidence that S were warned by their own bank and continued anyway, and I don't think the circumstances of the scam and the payment would have been easily identifiable as fraudulent at the time.*

*Overall, I'm not currently persuaded that, when sending the payment, S knew or reasonably ought to have suspected that there might be a problem but continued irrespective of this. No funds remained in the recipient account when HSBC were notified that the payment had been made as the result of a scam. So, I don't think there were any failures by HSBC in terms of the recovery attempts that did take place.*

*I've also considered whether interest should be added to my proposed award. And in the circumstances of this complaint, I'm not persuaded it should be. S have confirmed both that it hasn't received any redress from any other source and that it hasn't been able to send the payment to its owner as a result of the scam. So had HSBC intervened as I'm intending to conclude it should have done, and made a full recovery, I think it's most likely that this would have been returned to S' owner at the time. I don't think S has been impacted by not having the money and I can't compensate S' owner for being without the funds as he himself isn't the complainant, S is.*

*I'm satisfied that HSBC are at fault and that this fault could have prevented S' entire loss. And so I think HSBC should refund S in full. I appreciate there were also other parties involved in this transaction, such as the perpetrators of the scam and the sending bank. So, I think it would be fair and reasonable that S should confirm that if it later receives any redress from any other source, it will return this to HSBC. By S accepting my decision this would become legally binding on both parties. I also think that S should, upon request from HSBC assign it's right to pursue any relevant third party to HSBC. This way HSBC has an option to seek to recover what I'm intending to direct it to pay, from a third party, should it choose to do so.*

#### *My provisional decision*

*For the reasons outlined above, but subject to any further information I receive from either S or HSBC I'm intending to uphold this complaint. I intend to direct that HSBC UK Bank Plc:*

- Pay S the equivalent amount of Euros that it would have received had £200,634.74 been returned on 1 June 2020 using the exchange rate in place on that date.*
- I also think that if S later receives further redress arising from the same loss from any third party that it would be fair and reasonable for this to be paid to HSBC. And that S should assign its legal right to pursue any third party in relation to this matter to HSBC, upon a request to do so."*

*S accepted my provisional decision. HSBC responded and made some further comments which I'll address below.*

## 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.

HSBC's further submissions focussed on two points: namely the basis for intervention and what realistically could have been done in the circumstances; and the complainant's conduct. I'll deal with each in turn.

HSBC have re-iterated that (from a legal perspective) they have no duty of care to protect third parties (particularly commercial entities) from the risks of fraud. Even if I were to accept that this is the legal position, our service will decide a complaint based on what is fair and reasonable in all the circumstances. And despite the lack of a contractual or customer relationship or a legal duty of care, if HSBC have failed against their obligations and that can reasonably be said to have caused the loss to S, I think it is fair and reasonable to direct that that loss be reimbursed.

HSBC have highlighted the timescales set out in the Payment Services Regulations 2017 (PSRs). Specifically that payments received need to be credited to an account promptly. They have also referenced HM Treasury's 'Payment Services Regulations – Review and Call for Evidence' (January 2023). Paragraph 44 of which states:

*“While the existing regulatory framework enables firms to refuse to process payments (and to delay processing payments for a limited period with ‘D + 1’), some firms have suggested there may be benefits to enabling further time for a payment delay specifically, in order to engage the customer, than is currently permitted under the legislation. In tandem, the government is also considering if there may be benefits to enabling receiving banks – if they suspect they may be hosting a fraudster’s account – to delay the crediting of funds to a payee’s account...”*

Given the above is a current government review and call for evidence, HSBC say this supports their position. And if our service is to decide that they ought to have departed from their legal obligations, we must be clear as to the grounds for doing so.

It is often the case that there are competing demands or obligations in cases of fraud or scams. HSBC are correct to say that they are expected to follow instructions provided by their customers and to promptly make available funds paid into an account. But there are also obligations to prevent fraud, scams, and the misappropriation of funds. And it is the friction between such competing obligations where the crux of the matter is found.

The obligations to process payments that HSBC have described are not absolute. And I don't agree that the existing regulatory or legal position prevents HSBC from taking action to prevent money from being paid away from an account in certain circumstances. This would include where HSBC have grounds to suspect that paying away funds would be furthering financial crime.

HSBC have challenged my reference to the FCA's 2016 Financial Crime – A Guide for Firms, pointing out that it includes *“This guide is not a checklist of things that all firms must do or not do to reduce their financial crime risk, and should not be used as such...”* I've considered this but the same guide also includes: *“The material in the Guide does not form part of the Handbook, but it does contain guidance on Handbook rules and principles...”* As such, I maintain that it includes examples and suggestions of good industry practice

(something I'm entitled to take into account) and remains a valid consideration for this complaint.

HSBC say they don't accept that the SYSC guidance I've referenced (along with the FCA's 2016 guide) fixes them with any obligation to block or freeze accounts. They say that I've treated the SYSC guidance as a checklist rather than *"the main issues which a firm is expected to consider in establishing and maintaining the systems and controls appropriate to its business"*. I've considered this, and I agree that the SYSC guidance is about systems and processes for the monitoring of accounts. But that monitoring has a purpose, and that is to be alert to and to react to various risks including AML concerns as well as fraud, scams and the misappropriation of funds.

I also note that HSBC's own account terms say: *"We'll make a payment from your account if you instruct us to unless:...*

- *There has been fraudulent or criminal activity of any kind whether or not linked to your account or your relationship with us and it's reasonable for us not to make a payment as a result;*
- *It would cause us to breach a law, regulation, code, court order or other duty...we're prevented from doing so due to us or any member of the HSBC Group carrying out financial crime risk management activity: or*
- *Someone else may have a claim over the money."*

And whilst I accept this isn't a step to be taken without good reason, the terms of the account give HSBC a fairly wide discretion as to when they can refuse to make payments and take what is considered appropriate action in relation to an account.

HSBC have said that they don't believe there were grounds for them to suspect their customer was a fraudster, such that they ought to have intervened in any payments. I don't agree. I think it's broadly accepted that a payment characteristic such as a large payment can present an increased risk of money laundering. And in the circumstances here, HSBC had been told by their customer that they anticipated receiving around £400,000 in the first year of the accounts operation. The incoming payment from S represented over 50% of this amount in a single transaction. And £200,000 is a very significant amount of money, the like of which hadn't been received in the account previously. Given the nature of the accountholder's business (as described at account opening), there is no obvious reason to expect such a significant payment to arrive from a European country.

It isn't the case here where the receipt of such sums (or anything approaching that amount) was regular or commonplace for the account. For clarity, I'm not suggesting HSBC ought to hold every payment of that value. But in the circumstances of this complaint and the particular account in question, the arrival of S' money represented a risk. And I think HSBC were entitled to hold that payment whilst they looked more closely.

So whilst the initial concern would have been due to potential AML concerns, it would then have become apparent that the accountholder may not have been the intended beneficiary of the payment. Which then ought to have engaged HSBC's fraud measures. The end result of which I think would most likely have been the return of S' funds.

HSBC have also said that without prejudice to their position that the complaint shouldn't be upheld at all, if it is, they still argue that a reduction for contributory negligence is appropriate. I've considered HSBC's points, but I'm not persuaded that a reduction should be made in the circumstances of this complaint. For clarity, S followed the process it had in place and a director signed off the payment being made. In hindsight it's easy to say that there ought to have been a call between S and its owner. But I don't think not having such a

process in place at the relevant time amounts to contributory negligence such that there should be a reduction in award.

The context of the reference to covid as a change for account details is set out above. HSBC have said that it wasn't reasonable for S to accept that a bank wasn't operational and receiving payments. I don't agree that the message clearly states the bank wasn't accepting credits (which I would agree would be unusual). It states that a bank is on lock-down and that an alternative, active, operational account will be provided. Similarly, I'm not persuaded that not questioning a payment to the UK (for an owner who was known to operate across Europe) means that S was negligent.

Overall, I don't think there was anything in the circumstances here where S knew or reasonably ought to have known that there was a potential problem with the payment, but went ahead despite this.

And having carefully considered HSBC's further submissions, I'm not persuaded to deviate from the outcome explained in my provisional decision.

### **My final decision**

For the reasons outlined above, my final decision is that I uphold this complaint. HSBC UK Bank Plc must:

- Pay S the equivalent amount of Euros that it would have received had £200,634.74 been returned on 1 June 2020 using the exchange rate in place on that date.
- I also think that if S later receives further redress arising from the same loss from any third party that it would be fair and reasonable for this to be paid to HSBC. And that S should assign its legal right to pursue any third party in relation to this matter to HSBC, upon a request to do so.

Under the rules of the Financial Ombudsman Service, I'm required to ask S and S to accept or reject my decision before 9 October 2023.

Richard Annandale  
**Ombudsman**