

The complaint

Mrs R complains that HSBC UK Bank Plc trading as first direct won't refund money she lost as a result of a scam.

What happened

Mrs R was in the process of purchasing a property. Unfortunately, her email account was compromised. This led to her communicating with fraudsters rather than her solicitor. The fraudsters were able to direct her to pay their own account, instead of the solicitor's. Mrs R sent around £370,000 to the fraudster's account, but all but £50,200 was later recovered.

On 18 May 2022 she attempted to make a payment of £1,200. While making that payment she received a message informing her that the account details she entered could not be checked using the Confirmation of Payee ("CoP") scheme. She chose to proceed. She was then asked the purpose of the payment, which she selected as "Making a large purchase (e.g. house or car)". She was presented with a warning that is discussed later in this decision. This payment was stopped by First Direct's fraud team, but because of the time of day they were unable to speak to her and the payment was therefore reversed.

The following day Mrs R attempted to make another payment – this time for a smaller amount - £200. She received the same CoP message. She was again asked for the purpose of the payment, but on this occasion she selected "Buying goods and services" and therefore received a different warning message (that was largely irrelevant to her circumstances).

Later that day Mrs R attempted to make a further £50,000 payment to the same account details. That payment was stopped by First Direct for fraud checks. During that call Mrs R said that she'd confirmed the account details over the phone. She also made a similar statement in relation to a subsequent larger payment.

When her solicitor advised they hadn't received any money, Mrs R contacted First Direct to report the fraud. She acknowledged that during a call with the bank she'd incorrectly advised it that she'd spoken to her solicitor to confirm the account details, when, in fact, she'd only received the account details over email. She accepted that she'd made an error in telling the bank she'd verbally confirmed the account details but she argued that First Direct hadn't done enough to warn her about this kind of scam. So, she asked First Direct to pay 50% of her loss as well as reimburse her (significant) legal costs.

First Direct refused and the matter was referred to our service. One of our Investigators considered First Direct's liability under the Lending Standards Board Contingent Reimbursement Model ("CRM Code") which requires its signatories to reimburse victims of APP scams like this one in all but a limited number of circumstances. The Investigator disagreed that First Direct could fairly rely on either exception it sought to rely on. They thought that Mrs R hadn't ignored an 'Effective Warning' as neither the written warnings provided to her or the telephone call met the definition of 'Effective' under the CRM Code. They also thought that Mrs R held a reasonable basis for believing that she was actually dealing with the solicitors, due to the complex and sophisticated nature of the scam and the

fact that First Direct, during the call prior to the £50,000 payment, hadn't explained why it was asking Mrs R how she'd checked the account details.

So, they recommended that First Direct pay Mrs R £50,000 and 8% simple interest per annum on that amount from the date First Direct declined Mrs R's claim under the CRM Code to the date of settlement. In addition, the Investigator thought that First Direct should pay Mrs R £100 compensation to reflect its poor customer service, but didn't recommend it refund Mrs R's legal fees.

First Direct disagreed. In summary, it said:

- The written warning provided in relation to the first smaller payment was 'Effective'. It advised Mrs R to check emails for spelling and grammatical errors and to check for even very small changes in the email address they are received from.
- First Direct didn't need to go into further detail about email interception scams during the calls because it was entitled to rely on Mrs R's response, on more than one occasion, that she had checked the account details over the phone.

As no agreement could be reached, the case was passed to me for a final decision.

In advance of my final decision, both parties agreed that the outstanding loss was £50,200, rather than £50,000.

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.

The starting point in law is that Mrs R is responsible for transactions she's authorised herself. But, as already set out, First Direct are a signatory of the CRM Code and it needs to demonstrate that any of the exceptions to reimbursement apply in order to fairly decline her claim. In this case, it seeks to rely on two of the exceptions:

- 1) Mrs R ignored an 'Effective Warning'
- 2) Mrs R made the payments without a reasonable basis for believing that the payee was the person she was expecting to pay.

Did Mrs R ignore an Effective Warning?

Mrs R cannot be said to have ignored an Effective Warning that she didn't receive. So while First Direct might feel justified in not going into further detail about email interception scams once it had established that Mrs R had verbally confirmed the account details, it cannot demonstrate that it provided an Effective Warning during the telephone call prior to the £50,000 payment.

As mentioned, the warning that Mrs R received when she attempted to make the first payment in dispute addressed the risks of 'Buying goods and services' and wasn't particularly relevant to her circumstances, so I haven't discussed it here.

Under the CRM Code a warning must, as a minimum, be understandable, clear, specific, impactful and timely. As noted, Mrs R only saw the warning most relevant to her circumstances when she was attempting to make the £1,200 payment, which was later reversed. As the warning wasn't displayed as part of the payment journey which caused Mrs

R loss, it's arguable whether it could meet the definition of timely under the CRM Code. But, even if I considered the warning to be timely, I don't think it met the definition of 'Effective' for other reasons.

The warning reads as follows:

"Caution this could be a scam

WARNING – If someone has told you to mislead us about the reason for your payment and choose the wrong payment type, stop. This is a scam.

Fraudsters may pretend to be a genuine business by impersonating them, often using emails and invoices. They may ask you to change existing payment details or provide you with new details to send your payment to. This could involve a payment you are expecting to make or a onetime payment.

What you need to do before making the payment

- *Check where you're sending the money or why the payment details may have been changed, by contacting the person or company using a phone number you have checked is genuine.*
- *Examine the email address to ensure it's the correct company or person.*
- *Check for any changes to the sender's email address. These could be very minor. For example, there could just be one character different.*
- *Check for any grammatical errors in the email or correspondence, or a change in the content or formatting compared with any previous correspondence.*
- *Even if you're expecting to make the payment, you should still complete these checks.*

Visit our Fraud Centre for further guidance on how to undertake the required checks before proceeding."

WARNING

By choosing to continue, you agree you've read our warning and are happy to proceed. You accept we may not be able to recover your payment if it is sent to a fraudster's account. If you're unsure, please stop immediately."

While this warning does contain some useful and relevant information, I think it lacks impact overall. The first part of the warning relates to an entirely different type of scam and, in my view, the average reader is likely to lose interest after realising that this part of the warning doesn't apply to them – particularly given the features of this type of scam. So, I don't think the warning is impactful and I don't think it meets the definition of an 'Effective' warning under the CRM Code. And, in the circumstances, I don't think Mrs R moved past the warning unreasonably.

Did Mrs R make the payment without a reasonable basis for belief?

It's first important to state that there were highly sophisticated aspects to this scam. The fraudster was in contact with both Mrs R and her actual solicitor. The fraudster sent Mrs R emails that had as attachments the results of searches that she reasonably believed could have only come from her solicitors (which, of course, they had). She was also able to ask questions of the solicitors and receive responses. It's evident that she strongly believed that the emails had come from her solicitor.

I've also reviewed the contents of the fraudulent emails and, on the whole, I don't think there was anything particularly concerning about their contents that might have alerted her to the possibility that they had been changed or altered.

So, Mrs R had very compelling reasons to think that the emails had come from her solicitors and wouldn't reasonably have been alerted to the fraud by the contents of the emails alone. The fraudsters were also able to explain away a lack of a positive Confirmation of Payee result. They said that the account the money was being sent to didn't offer this facility. That's true of some accounts, so isn't an entirely implausible explanation and it's clear that Mrs R didn't find it so.

In addition, Mrs R thought she was taking sensible steps to guard against risk after receiving the negative CoP result (albeit a different risk – that there was an error in the account details she'd been given) by making a smaller payment to the account and checking it was received before making the larger one. This indicates to me that she wasn't generally being careless and was showing caution consistent with the significant value of the transactions.

It can also reasonably be inferred from these actions that if she recognised that there was a more than negligible risk that the emails hadn't come from her solicitor, she would have taken appropriate steps to counter that risk. So, I've thought about whether she ought to have recognised that risk.

Mrs R told the bank on more than one occasion (though only once prior to making the £50,000 payment) that she'd verbally confirmed the account details. Specifically, Mrs R said that she 'spoke on the phone' to the solicitors. I don't think this is ambiguous. The fact Mrs R went onto make a similar statement in relation to the later £199,000 payment doesn't suggest it was a slip of the tongue either. Mrs R says that, professionally, she understood 'spoke' to mean emailed but the use of not just spoke, but 'spoke on the phone' makes it difficult to see how Mrs R could have believed this.

I think Mrs R must have thought that it was irrelevant whether she'd spoken to the solicitors or emailed them and the bank were just trying to clarify whether she was confident that the account details were correct. As I've set out, I think that there were very strong reasons for her to believe that the emails had come from her solicitor. So, I've thought about whether it was still reasonable for her to hold that belief in light of the events leading up to that payment – specifically the written warning and conversation she had with the bank.

In her complaint to our service Mrs R did not deny all knowledge of this kind of scam, only that she didn't know how prevalent it was. The warning I've set out above did explain the risk here. It's not clear whether she read that warning at all, or in any detail. But, even if she'd read a little more than the opening statement of that warning, she would have at least a general awareness of the risk. But I don't think a general awareness of the risk was enough here. In order to find that Mrs R lacked a reasonable basis for belief, I need to find that she understood that there was a risk in her specific circumstances and she decided to proceed regardless. She would have needed to have studied the warning in some detail to better appreciate that there was a risk that her emails had been intercepted. And, as I've already set out, the warning wasn't effective, I don't think Mrs R unreasonably moved past it and, while it contained a number of quite prescriptive steps, it didn't explain that fraudsters could seamlessly insert themselves into genuine correspondence, as they had in this case.

During the call prior to the £50,000 payment little was done to explain the context of the question about how the account details were obtained. This is understandable, but it does mean there was little to shake Mrs R's belief that she was dealing with the genuine solicitor. I think, on balance, she failed to understand the importance of the question being asked and

believed, reasonably, that the steps she was taking were the necessary steps to ensure that the funds went to the correct account.

Had First Direct explained in any detail why this question was being asked and that it was imperative that she should contact her solicitor by phone regardless of how sure she was that any emails were genuine, then my view on this point would have likely been different.

I don't think the fact that First Direct relied on Mrs R's statement has much relevance here – the test is whether Mrs R's belief was reasonably held, not whether First Direct could have prevented the scam or were correct to process the payment. And though I think this is a finely balanced point and I consider Mrs R's response to First Direct's question to be careless, given the complexity and sophistication of the scam overall, I don't think First Direct can rely on this exception to reimbursement and I also don't think her actions amount to gross negligence (another exception to reimbursement under the CRM Code).

That means First Direct should refund Mrs R in full under the provisions of the CRM Code. It should also pay 8% simple interest per annum on that amount from the date it declined her claim under the CRM Code to the date of settlement.

Mrs R has asked First Direct to reimburse her legal fees. While I understand why she instructed solicitors – given the amount of the loss and the need to act quickly – I am not going to ask First Direct to reimburse those costs. Mrs R could have, without charge, complained to all parties involved in the dispute and our service.

Finally, in relation to compensation, I consider the Investigator's award of £100 for a piece of correspondence that was sent out in error to be reasonable. I can imagine that this caused further distress at an already difficult time.

My final decision

I uphold this complaint and instruct HSBC UK Bank Plc to pay Mrs R:

- The outstanding loss - £50,200
- 8% simple interest per annum on that amount from the date it declined her claim under the CRM Code to the date of settlement, less any tax lawfully deductible.
- £100 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 27 October 2023.

Rich Drury
Ombudsman