

The complaint

Mr P complains that HSBC UK Bank Plc trading as first direct won't refund money he lost when he fell victim to an investment scam.

Mr P is being represented by solicitors in this complaint.

What happened

In 2018, Mr P fell victim to an investment scam perpetrated by XtraderFX. He came across an advertisement for it which appeared to be endorsed by a well-known television programme. Mr P left his details on an enquiry form and was contacted by a representative who sold him a trading opportunity.

Between April and September 2018, Mr P made nine transactions totalling approximately £33,000 to fund his investment account. He eventually realised he'd been scammed when he saw his account balance go down to zero and his account manager declined his calls.

Mr P reported the matter to first direct in October 2018. He also notified the police and Action Fraud. The bank asked Mr P for documentation to raise a chargeback in relation to the card payments, and it tried to recall the sole international payment by contacting the recipient bank. According to first direct's system notes, neither Mr P nor the recipient bank replied.

Mr P complained to first direct in November 2022 and subsequently referred it to our service. Our investigator thought that first direct hadn't acted unreasonably in relation to the first six payments as they didn't appear unusual. Although first direct had blocked one of the payments and spoken to Mr P, the investigator was satisfied that the bank's enquiries were proportionate given the amount involved.

But the investigator concluded that the seventh payment (£25,000) ought to have flagged as unusual and out of character for Mr P's account activity, and first direct should have intervened and asked him suitably probing questions. And had it done that, they thought he wouldn't have gone ahead with it – or indeed the subsequent payments. They didn't think Mr P should share the blame for what happened and recommended first direct to refund the last three disputed transactions along with interest.

Mr P accepted the investigator's assessment, but first direct only partially accepted it. In summary, it said that while it was willing to refund the last two transactions in full, it believed that Mr P should share equal liability for the seventh payment as he didn't carry out any due diligence before sending such a large sum of money.

As an agreement couldn't be reached, the complaint was escalated to me for review and determination.

I wrote to both parties informally and explained that I would be telling first direct to also refund any associated charges (such as non-sterling fees) should I decide to uphold the complaint. I also clarified that, should the complaint be upheld, the interest award I would

make would be at the rate of 8% simple per year and not what the investigator had recommended.

Both parties have responded and said that they have no objection to what I proposed. So, it's appropriate for me to progress matters.

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.

Although I've only summarised the background and arguments above, so not everything that happened is detailed, I'd like to reassure Mr P and first direct that I've read and considered everything in its entirety.

first direct has ultimately accepted that the international payment for £25,000 on 1 August 2018 should have triggered its systems. Given that it's offered to refund 50% of this amount and the remaining two payments in full (£1,141.79 and £2,892.53 which were made using Mr P's debit card on 27 September 2018), it seems to me that it has also accepted the investigator's conclusion that it should have questioned Mr P and provided a scam warning; and that the warning would more likely than not have stopped him in his tracks.

So, I don't necessarily need to make a finding on intervention and causation. However, in its response to the investigator's assessment, first direct has said that it's taking this scam case at face value due to lack of any documentation between Mr P and the scammer. So, for the sake of completeness, I'll address this point and cover off intervention and causation.

Was Mr P scammed?

Given first direct has questioned whether Mr P was indeed scammed, I've considered whether XtraderFX was a legitimate trader. I'm satisfied that it wasn't.

This is because on 6 July 2018, the FCA published a warning about XtraderFX that it was offering financial services in its jurisdiction without authorisation. And in June 2020, the High Court of England and Wales wound up GPay Ltd – of which XtraderFX was a trading name – after it lost a substantial amount of client money.

In doing so, the Insolvency Service commented on the scam nature of the online platform. While this information wasn't available at the time of Mr P's payments, it helps build an overall picture of scammers dishonestly seeking gains at the expense of others.

At the time of reporting the scam to first direct in October 2018, Mr P said his dealings were with XtraderFX and payments were arranged through it. I acknowledge that only the last two payments went directly to that firm, and that the previous payments went to a few different merchants. But as first direct knows or ought to know that it isn't uncommon for scammers to ask customers to make payments through more than one merchant.

As for the lack of documentation, Mr P told the bank at the time of reporting the scam that his communication with the scammer was mostly over the phone.

Intervention and causation

In accordance with the law, regulations and good industry practice, a bank should be on the look-out for and protect its customers against the risk of fraud and scams so far as is reasonably possible. If it fails to act on information which ought reasonably to alert a prudent

banker to potential fraud or financial crime, it might be liable for losses incurred by its customer as a result.

I've looked at the operation of Mr P's account and I agree with the investigator that the first six payment amounts weren't *that* unusual for the account activity such that I would expect them to have flagged as unusual. But we know that one of the transactions did flag and first direct spoke to Mr P about it. I've listened to the call recording, and it appears to be in relation to the second payment of £359.06 on 24 April 2018. Like the investigator, I'm satisfied that the bank's questions – checking that the card was in Mr P's possession and that it was him making the transaction – were proportionate to the amount involved. By that point, he'd made several payments of similar value to the same merchant over three weeks and not raised any concerns.

The seventh transaction was significantly unusual and first direct has acknowledged that. As I've said, its response to the investigator's view suggests that it also accepts that an intervention would likely have prevented Mr P from going ahead with that payment. For completeness, I consider that first direct ought to have properly questioned Mr P about the payment. And that it should have provided an investment scam warning. Had it done so, I've no reason to doubt that Mr P would have explained the true purpose of his payment, as well as how he came to know about XtraderFX and the 'investment opportunity'.

While I acknowledge first direct's comment that Mr P had bought into the scam, I'm not persuaded that he would have ignored a warning from his trusted bank. Had first direct done so, I'm satisfied that Mr P would have looked into the investment opportunity further and discovered more information about this type of investment, how high-risk it was and whether XtraderFX was regulated here or abroad. Indeed, it's likely he would have come across the warning published by the FCA himself and that would have been enough to give him second thoughts such that he wouldn't have traded at all. So, I think first direct can be held liable for that payment as well as the subsequent payments in dispute.

Recovery of earlier payments

The first six transactions, which I don't consider first direct should be held liable for, were card payments. The only avenue for recovery once the card payments were made would have been a chargeback.

As soon as first direct became aware of the scam, it requested supporting documentation from Mr P to enable it to consider raising a chargeback. But I can't see that Mr P ever responded with the very specific evidence required by the card scheme operator for a chargeback to be considered valid, and potentially succeed.

Under the circumstances, I don't consider first direct failed to take appropriate action with regards to recovery.

Contributory negligence

There's a general principle that consumers must take responsibility for their decisions. I've duly considered whether Mr P should bear some responsibility by way of contributory negligence. But he was drawn into the scam by someone purporting to be a legitimate trader, in much the same way as many other people have been. Mr P saw his trading account performing well and it was being managed by a broker who he thought was a professional. He started with smaller payments and was encouraged to deposit more money after seeing his returns.

first direct argues that Mr P doesn't appear to have carried out checks on independent websites such as the FCA before parting with £25,000. I do appreciate that there was a warning about XtraderFX in the public domain at the time of that payment. But Mr P's first payment in connection with this scam was nearly four months prior, when a regulator warning – or other adverse information – hadn't been published. Regardless, the bank was the professional in financial matters; Mr P was a layperson. I wouldn't reasonably expect a layperson to know that they should be checking the regulator's website for published warnings before transacting with a financial firm.

first direct had better insight into this type of fraud to understand the level of sophistication involved with these types of scams. Notably, simulated trading platforms and merchants preventing cardholders from withdrawing their available balances. I don't think Mr P could have reasonably known the operation of this type of scam unless prompted by, for instance, his trusted bank. I think the onus was on first direct to inform Mr P of the risk that he would likely lose all of his money if he made payments to XtraderFX.

I've thought about this carefully, given the imbalance of knowledge between the parties. While acknowledging that Mr P could have done more research about investment scams in general – as can most customers – overall, I'm not persuaded that it would be fair to make a deduction for contributory negligence in this case.

Putting things right

To put matters right, HSBC UK Bank Plc trading as first direct needs to refund Mr P the last three disputed transactions – £25,000 on 1 August as well as £1,141.79 and £2,892.53 on 27 September 2018 – along with associated fees and charges.

In line with our service's approach that customers should also be compensated for being deprived of their funds but for the respondent business's mistake, the bank also needs to add simple interest at 8% per year, calculated from the date of each payment to the date of settlement (less any tax properly deductible).

I'm aware that the transaction on 1 August was funded from Mr P's pension. What I'm considering here is what would have happened but for the bank's mistake, not what would have happened but for the scam itself. Here, Mr P had already withdrawn the funds from his pension.

Keeping in mind the quick and informal nature of this service, I remain satisfied that it is fair to apply simple interest at 8% per year to that transaction too as it compensates Mr P for being deprived of the funds as a result of the wrongdoing for which I'm holding the bank liable.

My final decision

For the reasons given, my final decision is that I uphold this complaint. HSBC UK Bank Plc trading as first direct needs to put things right for Mr P as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 18 November 2023.

Gagandeep Singh
Ombudsman