

The complaint

Miss D complains that HSBC UK Bank Plc trading as First Direct do enough to protect her from the financial harm caused by an investment scam company, or to help her recover the money once she'd reported the scam to it.

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.

Miss D met someone on a dating site, who I'll refer to as "the scammer". The scammer told her he was based in the UK and after a few days they began to communicate via WhatsApp. The scammer seemed genuinely interested, and they exchange messages and occasional voice-notes.

The scammer mentioned early on that he invested in cryptocurrency and after a couple of weeks, he encouraged Miss D to invest. She was interested because she knew of people who had made a significant amount of money and she believed he was an experienced and professional investor.

The scammer explained that everything was done through a cryptocurrency exchange company and that he traded through a platform which was affiliated with the exchange, which I'll refer to as "C". Miss D researched the cryptocurrency exchange company, noting positive reviews. She also looked it up on the Financial Conduct Authority ("FCA") register and found it was regulated. She didn't realise C wasn't a part of the cryptocurrency exchange.

The scammer told her to first purchase cryptocurrency through the cryptocurrency exchange company and then load it onto an online wallet. Between 7 July 2022 and 12 July 2022, she made four payments totalling £36,000 from her HSBC account.

She started with an initial investment of £1,000. The second payment of £5,000 was blocked and during the call she said she was investing in cryptocurrency and her partner had helped her with the checks. She was asked if she'd been promised significantly high returns and she said it 'it depends how the numbers work'. She also said the funds go into the app and were 'transferred across to the 'investors. She was asked if anyone had access to her wallet and she said 'no' and that the investment didn't involve anybody else. She was then given a scam warning and the payment was released.

Miss D could see her profits increasing on the trading platform so looked to make a withdrawal of £1,350, which she managed to do successfully. She then made two further payments of £15,000 each, which involved calls with HSBC on 11 July 2022 and 12 July 2022.

Miss D realised she was the victim of a scam when she tried to make a further withdrawal and was told she would have to pay 20% tax. She contacted the cryptocurrency exchange

company who asked whether anyone else was helping her with the investment, at which point she realised she was the victim of a scam.

Miss D complained to HSBC, but it said it was unable to refund the money she'd lost as the payments were to an account she held in her own name. It explained that three of the payments were held for fraud checks and she had told it she had full access to the investment, and she'd checked investment was genuine. She also said she hadn't been asked to make the investment and was acting of her own free will. It said it gave her information regarding the risk of scams and that it wouldn't be liable for any losses.

Miss D wasn't satisfied and so she complained to this service with the assistance of a representative, who explained Miss D had little to no knowledge of cryptocurrency and had simply followed instructions given to her by the scammer. They said this type of scam has been incredibly prevalent and HSBC would have known how the scam operated.

They argued the transactions were out of character and before the scam Miss D made small transactions for everyday spending and she had sent almost her entire account balance to a cryptocurrency provider that HSBC should have known was popular with fraudsters. She also transferred funds from other accounts before transferring it straight out, having never sent funds to cryptocurrency merchants before. The representative said this constituted a sudden and drastic change in the operation of the account and was financial activity that matched a known fraud risk.

The representative further explained that Miss D had made it clear the investing was done off the back of a relationship with someone else and it failed to conduct in depth questioning to properly understand why she was investing and how the third party was involved in her investments. They said that if Miss D had been properly questioned, she'd have fully explained she was sending money to C and that the investment was being managed by someone she'd met online. With this information, HSBC should have recognised C wasn't affiliated with the cryptocurrency exchange and the fact Miss D met the third party online matched an extremely common type of investment scam.

HSBC said it supplied an effective warning and advised Miss D to seek advice from a financial adviser when she made the first payment. It said she told it she hadn't been contacted by a third party and was making the payments of her own volition. It said she'd been promised unrealistic returns and the fact she transferred the funds to an account in her own name meant there was no reason for it to consider offering a refund.

My provisional findings

I was satisfied Miss D authorised the payments for the purposes of the of the Payment Services Regulations 2017 ('the Regulations'), in force at the time. So, although she didn't intend the money to go to scammers, under the Regulations, and under the terms and conditions of his bank account, Miss D is presumed liable for the loss in the first instance.

Not every complaint referred to us and categorised as an investment scam is in fact a scam. Some cases simply involve high-risk unregulated investments that resulted in disappointing returns or losses. Some of these investments may have been promoted using sales methods that were arguably unethical and/or misleading. However, while customers who lost out may understandably regard such acts or omissions as fraudulent, they do not necessarily meet the high legal threshold or burden of proof for fraud, i.e. dishonestly making a false representation and/or failing to disclose information with the intention of making a gain for himself or of causing loss to another or exposing another to the risk of loss (Fraud Act 2006).

I carefully considered the circumstances, and I was persuaded Miss D was the victim of a scam. But, although she didn't intend her money to go to scammers, she did authorise the disputed payments. I explained HSBC is expected to process payments and withdrawals that a customer authorises it to make, but where the customer has been the victim of a scam, it may sometimes be fair and reasonable for the bank to reimburse them even though they authorised the payment.

Prevention

I thought about whether HSBC did enough to prevent the scam from occurring altogether. Buying cryptocurrency is a legitimate activity and from the evidence I'd seen, the payments were made to a genuine cryptocurrency exchange company. However, HSBC had an obligation to be alert to fraud and scams and these payments were part of a wider scam, so I needed to consider whether it did enough to warn Miss D when she tried to make the payments.

Miss D had tried to pay £5,000 to the cryptocurrency exchange on 11 July 2022 and the payment was flagged for further checks. I listened to the call, and I was satisfied she was open about the fact she was investing in cryptocurrency. I noted her answer about the returns was equivocal, but as she didn't say she'd been promised unrealistic returns, I didn't think the call handler needed to ask further questions. She also mentioned her partner in the context of whether she'd done any checks, and I didn't think further questioning was necessary there either.

However, Miss D told the call handler the cryptocurrency would be transferred from the exchange company to an investor and at this point I thought the call handler ought to have realised there was a problem and questioned her about the onwards payment. I explained most cryptocurrency scams involve the transfer of funds from legitimate cryptocurrency accounts to wallets under the scammer's control, and by the time this call took place, the call handler should have known this and acted on the information as it arose during the call.

I said I would expect the call handler to have asked some very robust questions to establish how and why Miss D planned to transfer money from her cryptocurrency wallet and to warn her that an onward payment was a clear red flag which strongly indicated the investment was a scam. I said I also expected the call handler to have explained that this was a common method used by fraudsters, and to have made it very clear that she shouldn't go ahead with the payment.

Had it done this, I thought Miss D would most likely have disclosed the fact she'd met someone online who had instructed her to move the cryptocurrency to C, which she understood was affiliated with the cryptocurrency exchange. This information would have further assisted HSBC to identify this was a scam and would have led Miss D to think twice about going ahead with the payments.

I hadn't seen any evidence that Miss D was keen to take risks with her money and from the evidence I'd seen, I didn't think she was completely under the spell of the scammer to the extent that she'd have gone ahead in the face of a very strong warning from HSBC that the investment was probably a scam. I accepted the scammer would have tried to change her mind and given her a plausible explanation as to why she needed to make the onward payment, but, she had never met this person and I thought she would reasonably have questioned why he told her the 'investor' was affiliated with the cryptocurrency exchange company when in fact it wasn't. And I thought that if she had an inkling this was a scam, she'd have decided not to go ahead with the payments.

Because of this, I thought HSBC failed to do enough in circumstances which might have prevented Miss D's loss. Consequently, I was minded to direct it to refund the money she lost from 11 July 2022 onwards.

Contributory negligence

I explained there's a general principle that consumers must take responsibility for their decisions and conduct suitable due diligence but, in the circumstances, I didn't think Miss D was to blame for the fact she didn't foresee the risk.

I explained Miss D hadn't invested in cryptocurrency before and so this was an area with which she was unfamiliar, so she wouldn't have known the onward payment from the cryptocurrency exchange was a red flag or that it wasn't affiliated with C. This unfamiliarity was compounded by the sophisticated nature of the scam and the fact she trusted the scammer, even though they'd never actually met. So, I didn't think she could fairly be held responsible for her own loss.

Developments

HSBC has commented that Miss D said she hadn't been contacted by a third party and was investing on her own. She mentioned that her partner also invests but she didn't refer to the fact she'd met him on a dating site, or that he'd encouraged her to invest and had she done so, it would have asked more questions.

It also asked if she'd checked the FCA website for cloned investment sites and she said she had and was satisfied she'd completed all the relevant checks, which would've adequately provided reassurance that the investment was genuine.

It accepts she told it the funds were being transferred from the cryptocurrency exchange company and then on to the investors and that it should have asked detailed questions about that. However, the previous advice it gave about checking the FCA website included checking it for any so-called investors if she was moving funds from the cryptocurrency exchange.

In response to my observations about Miss D's comment about sending money on to investors, it has said it made a clear statement about the actions of criminals, and that scams often involve positive fake testimonials. It also reiterated that she should always check where she is sending money and that she said she was happy the payment was genuine and was adamant she wanted it to release the payment.

Finally, HSBC has argued that Miss D would have proceeded in any event and, but if it is required to provide a refund, the settlement should be reduced by 50% for contributory negligence.

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.

I've carefully considered the additional comments HSBC has made in response to my provisional decision. I accept Miss D didn't tell the call handler she'd met the partner on a dating site and as I said in my provisional decision, I didn't think further questioning was necessary. I also accept that during the first call she said the investment didn't involve anyone else when in fact she was being advised in the background by the scammer. However, I don't consider this was untruthful because she did mention that she was being

assisted by her partner, and I wouldn't expect her to volunteer how they met or how long they'd known each other unless specifically asked.

HSBC has said Miss D told it she'd checked the FCA website and that she was satisfied she'd completed the relevant checks. But this is because she checked the cryptocurrency exchange in the mistaken belief that it was affiliated with C. And while I accept she was told she should check where she was sending money, HSBC didn't say anything which might reasonably have alerted her to the fact she hadn't done enough checks.

As I said in my provisional decision, Miss D told the call handler the cryptocurrency would be transferred from the exchange company to an investor and I maintain that HSBC's failure to question her about the onwards payment represented a clear missed opportunity to uncover the fact that she mistakenly thought C was affiliated with the cryptocurrency exchange and to explain that most cryptocurrency scams involve the transfer of funds from legitimate cryptocurrency accounts to wallets under the scammer's control. And I maintain this was a missed opportunity to have uncovered the scam.

HSBC has also said Miss D had checked the FCA register and was under the impression the investment was genuine, so a warning wouldn't have made a difference. But I don't think she was completely under the spell of the scammer to the extent that she'd have gone ahead in the face of a very strong warning from HSBC that the investment was probably a scam. It has said she was under the impression the investment was genuine because she'd checked the FCA register, but if HSBC had taken the opportunity to ask more questions and provide a relevant warning, she'd have realised she hadn't done the proper checks and, ultimately realised this was a scam.

Contributory negligence

HSBC has also said the settlement should be reduced for contributory negligence. As I've explained above, I don't accept Miss R was untruthful about the existence of a third party because she did state her partner was helping her. And while I accept HSBC could have helped her more if it had known she'd met the partner on a dating site, I wouldn't reasonably have expected her to have volunteered how long she'd known him or how they met without having been asked for the information by the call handler.

So, even though Miss D was acting on advice from someone she met online, I think this was a sophisticated scam and she went ahead with the payments in the belief that she'd done appropriate due diligence. And while I accept she could have been clearer in her responses, I'm satisfied she told HSBC she was being helped by her partner and that she planned to make an onward payment from a cryptocurrency exchange, and in these circumstances I don't think this is a case where it would be appropriate to reduce the settlement for contributory negligence.

My final decision

My final decision is that HSBC UK Bank Plc trading as First Direct should:

- refund £35,000.
- pay 8% simple interest*, per year, from the respective dates of loss to the date of settlement.

*If HSBC UK Bank Plc trading as First Direct deducts tax in relation to the interest element of this award it should provide Miss D with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss D to accept

or reject my decision before 6 December 2023.

Carolyn Bonnell
Ombudsman