

The complaint

Mr H complains that HSBC UK Bank Plc didn't do enough to protect him from the financial harm caused by an investment scam company, or to help him recover the money once he'd reported the scam to it.

What happened

In January 2021, Mr H received a marketing email from a company I'll refer to as "T", introducing themselves as brokers who specialised in cryptocurrency investments. Mr H was sent a link to T's website which featured its T&Cs, and a certificate of its registration with the Global Financial Authority ("GFA").

Mr H looked T up on Trustpilot and saw it had a three-star rating. There were some negative reviews, but after speaking to one of T's brokers, he was satisfied they'd been posted by people who had deposited small amounts and were unhappy with the returns. The broker explained T was based in Switzerland and didn't need to be regulated by the Financial Conduct Authority ("FCA"). He said fees and taxes would need to be paid before Mr H could make withdrawals, and that he'd be able to withdraw a monthly dividend when the account balance reached £30,000.

The broker advised Mr H to download Anydesk and then purchase cryptocurrency through a cryptocurrency exchange company before loading it onto an online wallet. Between 15 February 2021 and 29 April 2021, he made 41 payments to three cryptocurrency exchange companies totalling £884,009.38 using a visa debit card and online transfers from his HSBC account. Our investigator also concluded that during the scam period Mr H received £8,386.62 credits into his account and £141,465 in refunds, meaning the total loss was £733,977.76.

When the balance on the trading account reached £16,000,000, Mr H decided to make a withdrawal, but the request was rejected. The broker told him he'd have pay withdrawal fees, which he paid with a director's loan from his company. But once he'd paid the fee, Mr H was told it had been paid to the wrong person and, when he refused to pay more, he lost contact with the broker, at which point he realised he'd been the victim of a scam.

Mr H complained to HSBC arguing it should have had fraud prevention measures in place which would have identified the transactions as suspicious and stopped them. But HSBC refused to refund any of the money he'd lost. It said alerts were triggered, but Mr H confirmed the payments were genuine, and they were released. It also said investment transactions are high risk and customers are expected to carry out their own due diligence to enable them to make informed decisions as to whether to proceed with the transactions.

It said several of the larger debit card transactions were referred to its customer care team, who warned Mr H the payee companies weren't covered by the FCA and it wouldn't be able to refund the payments, yet he was happy to proceed with the transactions.

It also said it had reviewed the documentation Mr H had provided and there was insufficient information to raise a misrepresentation chargeback against the cryptocurrency exchange

companies. And it said the Contingent Reimbursement Model (“CRM”) code wouldn’t apply to the online transfers because the funds had been sent to an account in his name.

Mr H wasn’t satisfied and so he complained to this service. He argued HSBC should have had measures in place to detect suspicious transactions or activities that might indicate fraud such as a sudden increased spending, transfers to other accounts, sudden changes to the operation of the account, a withdrawal or payment for a large amount, a payment or series of payments to a new payee and financial activity that matches a known method of fraud or financial abuse.

He accepted HSBC had provided warnings, but he said there were no further attempts to educate him or to discourage him from going ahead with the payments and it could have researched T and discovered it was operating a scam, rather than relying on the due diligence he’d done himself. He said it knew scam companies existed and the kind of patterns that should raise alarm bells. And if it had asked for evidence of communication with the merchant, it would have realised he wasn’t given an investment brochure or information. Finally, he said HSBC should have raised a chargeback request on the basis there had been a misrepresentation.

HSBC said when Mr H made the first faster payment on 15 February 2021, he confirmed that no one had approached him to make the payment and that he wanted to go ahead. It said there were a number of conversations about the investment when Mr H was told it wouldn’t be able to recover the funds if something went wrong and it ultimately suspended his online banking in June 2021 and said it wouldn’t allow any further payments until he provided evidence the investments were genuine.

My provisional findings

The CRM Code requires firms to reimburse customers who have been the victims of Authorised Push Payment (‘APP’) scams, like the one Mr H says he’s fallen victim to, in all but a limited number of circumstances. HSBC had said the CRM code didn’t apply in this case because the code doesn’t apply to card payments or payments to an account in the consumer’s own name, and I was satisfied that’s fair.

I thought about whether HSBC could have done more to recover Mr H’s payments when he reported the scam to it. Chargeback is a voluntary scheme run by Visa whereby it will ultimately arbitrate on a dispute between the merchant and customer if it cannot be resolved between them after two ‘presentments’. Such arbitration is subject to the rules of the scheme — so there are limited grounds on which a chargeback can succeed. Our role in such cases is not to second-guess Visa’s arbitration decision or scheme rules, but to determine whether the regulated card issuer (i.e. HSBC) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder (Mr H).

Ms H’s own testimony supports that he used cryptocurrency exchanges to facilitate the transfers. It’s only possible to make a chargeback claim to the merchant that received the disputed payments. It’s most likely that the cryptocurrency exchanges would have been able to evidence they’d done what was asked of them. That is, in exchange for Mr H’s payments, they converted and sent an amount of cryptocurrency to the wallet address provided. So, any chargeback was destined fail, therefore I was satisfied that HSBC’s decision not to raise a chargeback request against either of the cryptocurrency exchange companies was fair.

I was satisfied Mr H ‘authorised’ the payments for the purposes of the of the Payment Services Regulations 2017 (‘the Regulations’), in force at the time. So, although he didn’t intend the money to go to scammers, under the Regulations, and under the terms and conditions of his bank account, Mr H 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 the broker was operating as part of a scam. But, although Mr H didn't intend his money to go to scammers, he did authorise the disputed payments. 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 could have done more 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 genuine cryptocurrency exchange companies. 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 ought to have done more when Mr H tried to make the payments.

HSBC contacted Mr H when he tried to make the first faster payment on 15 February 2021. I've listened to the call, and I agreed with our investigator that he wasn't completely open in his responses to HSBC's questions and so it didn't identify that he was at risk of fraud.

Our investigator had also said that payments 2 to 17 weren't unusual when compared to the usual spending on the account. I've reviewed the account statements, and I could see there was a history of multiple large payments in quick succession after receiving large credits into the account. Specifically, Mr H made a transfer of £20,110.08 on 6 November 2020, transfers of £23,217.33 and £15,173.36 on 8 November 2020 and transfers of £25,000 and £65,000 on 2 December 2020. And based on this activity I agreed with our investigator that HSBC need not have intervened until 21 March 2021 when Mr H made a payment of £36,000. This is because it was the third consecutive payment in three days which totalled £124,000, which was significantly higher than the previous cumulative spend on 2 December 2020. So, I was satisfied that payment ought reasonably to have triggered an intervention.

I explained that during that call I would expect HSBC to have asked some very detailed questions around the purpose of the payments, whether there was a third party involved, how he met the third party, whether he'd been required to download remote access software, whether he'd been allowed to make any withdrawals and whether he'd been promised unrealistic returns. I had some concerns as to whether Mr H would have answered truthfully because he wasn't open about the existence of the broker during the call on 15 February 2021. But based on the fact he told HSBC about T on 27 April 2021, I thought, on balance, he'd have probably mentioned T. And it's likely he'd have also mentioned the fact T was authorised by the GFA and that he had merchant's insurance.

With this information, HSBC ought to have provided a full scam warning, including examples of different types of scams. It should also have told him about the FCA warning and the fact the GFA didn't exist in the way he'd been led to believe. And I would expect it to have

explored the issue of insurance, even requiring him to produce a copy in branch, which would surely have exposed the fact he wasn't insured.

However, even if HSBC had done all this, I didn't think it would have made a difference to Mr H's decision to go ahead with the payments. This is because, he'd known about the negative reviews on Trustpilot and the fact T wasn't authorised by the FCA at the outset, but he wasn't concerned because he'd been given a plausible explanation by the broker about the reviews. And he didn't think T needed to be authorised by the FCA because it was based in Switzerland. Yet he went ahead with the payments, even after being told about the FCA warning, so I didn't accept it would have been any different if HSBC had told him about it sooner.

All the available evidence shows Mr H was completely under the spell of the scammer and was confident the investment was genuine and as such he was willing to ignore clear warning signs. I was satisfied none of the information HSBC might have given to Mr H about red flags or cryptocurrency scams would have changed his mind. Critically, HSBC suspended his online banking in June 2021 and said it wouldn't allow any further payments of this nature until he provided evidence that the investment was genuine, and instead of doing further research or taking independent advice, he opened an account with another bank and continued to invest a further £561,750.

Significantly, Mr H didn't mention T to the other bank when it intervened in those payments, and I'd seen messages from Mr H to the scammer dated in August 2021 in which he states that his accountant had told him the GFA didn't exist and that it looked like T was operating a scam. He continued to make payments from the other account in the face of this advice and so it wouldn't have made any difference if HSBC had told him the same thing in March 2021, or at any point up to the date it suspended his online banking.

Overall, I thought it was clear that Mr H was happy to take risks with the money he was investing, and I was satisfied he was determined to go ahead with the investment notwithstanding red flags and warnings that were brought to his attention at various points, including concerns from his accountant which he should reasonably have acted on. Because of this, I didn't think HSBC missed an opportunity to intervene in circumstances when to do so might have prevented his loss.

Developments

Mr H has made further comments in response to my provisional decision, including some more information about events in the period leading up to the payments, which I won't repeat here.

He's said HSBC are his main bank and he uses the account for all day-to-day transactions. He's explained his normal transactions consist of wages in and credit card payments out, with exceptional items including cars and his wife's HMRC and pension. He maintains the scam payments were unusual and that HSBC should have intervened as they are the experts and had an obligation to protect him.

Mr H says he sent a copies of T's GFA certificate and T&Cs to HSBC. He accepts his accountant told him told GFA didn't exist, but he later said it did exist and was registered in Hong Kong. The accountant was also familiar with the trading platform, which had reassured him the investment was genuine.

He doesn't agree the returns were too good to be true and has explained that he had no concerns at the start of the scam as he had checked the trading platform with an independent source. He doesn't accept he was under the spell of the scammer because

many of the trades were taken out over an extended period, so couldn't be manipulated through day trading.

He has also explained that the later monies transferred into his trading account were for withdrawal fees, rather outright trading, which is when the problems occurred.

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 Mr H's additional comments and the evidence he has submitted, but I'm afraid the findings in my final decision will remain the same as the findings in my provisional decision. I have addressed what I consider to be the main points below.

Mr H has made comments around whether the payments were unusual for the account. I've considered these comments and I maintain my view that payments 1 to 17 weren't unusual when compared to the normal spending on the account and that HSBC ought to have intervened on 21 March 2021.

Mr H has said he sent a copy of the GFA certificate to HSBC, but as I said in my provisional decision, I don't think it would have made a difference if it had told him the GFA didn't exist because his accountant had already told him that. He accepts his accountant initially told him the GFA didn't exist, but he's said he later said it did exist and was registered in Hong Kong. I haven't seen any evidence that the accountant told Mr H the GFA did exist but even if he did, Mr H should have acted on the initial advice that the GFA didn't exist because this was a clear sign that his broker was misleading him, and I maintain that his failure to do so means it's unlikely he'd have acted on the same information if given to him by HSBC.

Mr H has said the later payments were for withdrawal fees, rather than outright trading. He has also said he checked the trading platform with an independent source and his accountant had seen the platform before. As I said in my provisional decision, the available evidence shows that he was completely under the spell of the scammer and these points support the conclusion that he was confident the investment was genuine to the extent that he went ahead with the payments even though he'd seen negative reviews on Trustpilot, he knew T wasn't authorised by the FCA and he'd been told about the FCA warning. This is because he'd been given a plausible explanation by the broker about the reviews, and he didn't think T needed to be authorised by the FCA because it was based in Switzerland.

I'm satisfied Mr H was happy to take risks with the money he was investing, and that he was determined to go ahead with the investment notwithstanding red flags and warnings that were brought to his attention at various points, including concerns from his accountant which he should reasonably have acted on. Because of this, I don't think HSBC missed an opportunity to intervene in circumstances when to do so might have prevented his loss.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 8 January 2024.

Carolyn Bonnell
Ombudsman