

## The complaint

Mr W brings a complaint on behalf of a limited company he is the sole director of, I'll refer to it as WP. Although the complaint is WP's, I'll often refer to Mr W as he is the one representing the complainant.

The complaint is that HSBC UK Bank Plc hasn't refunded transactions made against WP's account without proper authority.

## What happened

I've already issued a provisional decision for this case. The content of that is included at the end of this final decision, added in *italics*. And so I'll only go on to include developments since the provisional decision and my final findings.

HSBC accepted the provisional decision and had nothing more to add.

Mr W replied on WP's behalf. I'll summarise the key points raised, it being unnecessary to include all the detail Mr W provided:

- Mrs W removed herself as director by resigning from WP;
- It could be accepted that Mrs W had written 'a very minor amount' of cheques for legitimate business purposes over the years. But Mr W is adamant he knew nothing about this and believes HSBC ought to have been vigilant in identifying any cheques not signed by him. He never gave permission for Mrs W to sign cheques herself;
- Mr W has been advised against pursuing a civil case;
- The loss wasn't reported sooner as it was Mrs W that looked after company accounts. Mr W himself never checked the accounts, being kept busy with the operation of the business. Mr W 'finds it incredible' that HSBC didn't challenge any of the cheques Mrs W signed and has only recently discovered the bank doesn't hold a record of his signature;
- Mr W confirms he uses an accountant but received no word about the payments to Mrs W. He says the accountant told him it wasn't for them to advise a client how to use their money.
- Mr W says he didn't try to have Mrs W added to the account in 2014. He wonders if this was a fraudulent attempt by Mrs W;
- Mr W doesn't believe he'll be able to recover the money either via divorce proceedings or if Mrs W were to be prosecuted.

It's now for me to consider Mr W's further submissions and provide my final decision.

## **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 have thought carefully about what Mr W has said since the provisional decision. Whilst I have summarised what he said in the previous section, I have considered the full detail of his submissions. And I've done so whilst having in mind the information and evidence that was already on file.

I'm not persuaded to deviate from the outcome and findings I previously set out. There isn't any new substantive or significant evidence or argument put forward by Mr W on behalf of WP. And my reasons for not upholding the complaint are unchanged.

I will provide further comment on the issue of the mandate amendment in 2014. On review, HSBC has provided little evidence of this, only referring to it as an event. It seems more likely than not it did happen, and HSBC has some evidence of it. But whichever way the attempted amendment is viewed I don't consider it alters the outcome. It's not going to be strong enough on its own to overturn my decision, should it show something suspicious. And it's also not a piece of information I've placed much weight on in not upholding WP's complaint.

## **My final decision**

I don't uphold this complaint against HSBC UK Bank Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask W to accept or reject my decision before 20 April 2024.

## ***What happened***

*Mr W has explained that WP used to have another director. That was Mrs W, his now estranged wife. She had been a part of the business for many years. But they separated in July 2021, with her being removed as director on 30 April 2022.*

*On 14 April 2022 Mr W had cause to visit an HSBC branch. When there he queried a cheque payment on the account he didn't recognise. He discovered this had been paid to Mrs W. Mr W has said he didn't authorise this payment, despite being the sole signatory on the account mandate. He says Mrs W had forged his signature.*

*This led to Mr W looking at the account statements further. These enquiries ultimately led to him discovering dozens of cheques paid to Mrs W that he says he didn't authorise. These cheques were issued over several years, dating back to 2008. Mr W states the loss to WP could be more than £500,000.*

*Mr W says that, when she was part of the company, Mrs W dealt with all financial matters for WP and, as a result, he never looked at the company accounts or bank statements. If there were bills or invoices to be paid by cheque then Mrs W would fill it out, with him adding his signature. And because he completely trusted Mrs W as both his wife and co-director, he'd felt no need to consider the company financials. He's said that was why the unauthorised transactions had gone undetected for so long.*

*Mr W raised a complaint with HSBC on WP's behalf, informing it of the unauthorised cheque payments and requesting a refund. But the bank said it wouldn't return any of the money. It said that the signatures and handwriting matched some cheques that were undisputed, suggesting Mr W knew Mrs W was writing cheques on behalf of WP.*

*It also said the matter was a civil dispute between parties known and connected to WP, and that the loss ought to be pursued in court.*

*HSBC also considered that customers are responsible for monitoring their accounts and notifying the bank of any problems in a timely manner. It didn't think it was reasonable to say the disputed payments had been reported in such a manner.*

*Mr W referred WP's complaint to our service as he was unhappy with HSBC's response. One of our investigators considered what had happened and recommended the complaint be upheld.*

*Our investigator first explained we wouldn't be able to consider all transactions because of how long ago they'd happened. This was accepted by all parties, and it was only cheques issued from 13 April 2016 that would be in scope for investigation.*

*Mr W had also reported card transactions to us as the complaint progressed. Our investigator told Mr W he'd have to submit a new complaint for WP about those payments as it didn't appear as though HSBC had been given the opportunity to consider them.*

*She was satisfied the evidence showed the disputed cheques had markedly different handwriting and signatures to genuine ones, evidencing Mrs W was writing and signing them herself. She said the cheques had been forged, making them invalid and meaning HSBC had debited WP's account without proper authority. And on that basis HSBC ought to refund them.*

*Our investigator considered WP's – and by extension Mr W's – failure to notice or report the transactions for such a long time. She noted the requirement to submit company accounts and the general responsibility of director's to be aware of company finances. And so, she felt WP ought to bear responsibility for half the value of the disputed cheques.*

*Mr O accepted the outcome, but HSBC didn't. In summary, it said:*

- There were cheques that had been signed by Mrs W, but which hadn't been disputed, including a payment to HMRC. It feels this demonstrates that Mrs W had been given permission to sign cheques on WP's behalf;*
- WP had submitted accounts for numerous years which should have meant an accountant reviewing the finances and questioning the cheques paid to Mrs W;*
- The dispute should be treated as a civil matter between the involved parties.*

*As a mutually agreeable outcome hasn't been reached the complaint has been passed to me for review.*

### ***What I've provisionally 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.*

*Having done so I'm reaching a different outcome to that of our investigator; I'm not upholding WP's complaint. I'll explain why.*

*Which cheques might be considered for reimbursement?*

*I must start by first narrowing the scope of which cheques might be considered for a refund. Our investigator found that only cheques issued after April 2016 could be considered as within our power to consider. I'm not departing from those findings which relate to our jurisdiction.*

*However, the terms and conditions of WP's account state the following:*

*You should check your statements carefully. If you see any mistakes or payments you don't recognise, you should tell us as soon as you can. If you don't tell us within 13 months of the problem, you may not be entitled to a refund.*

*HSBC has said it is relying on this term to deny a refund for some of the payments. And it means it can do so without a consideration of whether the cheques were properly authorised or not.*

*This is a common feature of account terms and conditions across many account providers. But it won't always be fair and reasonable for a firm like HSBC to rely on such a term. Consideration must be given to the circumstances of the complaint to determine whether such a term can fairly and reasonably be applied.*

*There will be occasions when there is an understandable reason for a customer not noticing payments that debit their account within 13 months and which they later dispute. However, I don't believe such a fair and reasonable explanation applies here.*

*Whilst I can understand what Mr W has said about trusting his wife and business partner to look after the bank account and company financials, it isn't fair and reasonable to say these payments have understandably gone unnoticed for so long. There have been accounts submitted for WP for years. Looking at Companies House records it would seem a professional accountancy firm was used for at least some of the years in which the disputed transactions occurred. It follows then that the cheques made out for Mrs W's benefit must have formed a part of WP's annual audit and would have been questioned and rationalised by the accountants. The argument made by HSBC about the cheques seemingly needing to be questioned over the years is a valid one.*

*The sum of money involved contributes to that position too. The cumulative amount removed from the business is huge, especially when cheques and card payments are all taken into account. It seems unreasonable to conclude that such vast sums could go unnoticed year after year. To give some context to this point, Mr W has stated WP's annual turnover as £100,000 on the complaint form submitted to this service. That would mean a value equivalent to an entire five years of company turnover would be missing from company accounts across the period in question. It is difficult to see how that could go unnoticed.*

*Given the requirement on WP, not only applied by the account terms and conditions, but also thinking about the requirements for running a limited company as a going concern, I don't find it's unreasonable for HSBC to rely on the 13 month exclusion term. And so only cheques issued as long ago as March 2021 might be considered for a refund.*

*Should HSBC have honoured the cheques?*

*The cheques in dispute here are a form of bill of exchange and so are subject to the Bills of Exchange Act 1882, as well as the Cheques Acts of 1957 and 1992 and the Small Business, Enterprise and Employment Act 2015.*

*Broadly speaking, a bank may only pay a cheque that is properly executed by the customer. That means adhering to the mandate held for the account in question. Should the signature on a cheque be forged, regardless of the standard of the forgery, it becomes a 'nullity' and essentially worthless.*

*And so if there is evidence in this case that HSBC paid out cheques that weren't signed by Mr W – as the sole signatory on the account mandate – then HSBC might generally be expected to reimburse WP. But there are other considerations I must think about too.*

*It's generally accepted that Mrs W was signing cheques. HSBC hasn't really argued that she wasn't, or that it was in fact Mr W that signed everything that's in dispute. In its submissions to this service, it has acknowledged differences in handwriting and the signatures.*

*What HSBC has argued is that the evidence shows Mr W was aware of – and happy with – this situation. That isn't to say that he expressly allowed the issuing of the cheques in*

dispute. But HSBC believes Mr W knew Mrs W was signing cheques for WP and, on that basis, it isn't fair and reasonable to say it ought now bear responsibility for any disputed funds.

I'm of the view HSBC's position here is fair and reasonable. I'm persuaded it's more likely than not Mrs W was given a position of agency when it came to writing the cheques. Mr W might not have known she would go on to issue cheques he wouldn't have otherwise approved. But that isn't the test here. And there is evidence which supports this giving of agency.

First is the amount of time these cheques were being paid. It doesn't seem feasible that such a deception could have been maintained for almost fifteen years without being noticed. There are dozens of cheques issued in that period, and the overall value is huge. My earlier findings, where I talked about the application of the 13 month term, carry through to my findings here. So I won't repeat that detail again. Suffice to say the key points are largely the same.

Second, I've considered that a similar agency position was created and did exist for the use of company cards. I'll restate here that I'm not making any findings in respect of liability for those payments. But the circumstances behind them are relevant here and Mr W has confirmed that Mrs W had full access to WP's card and PIN. That's despite her not being an authorised signatory or card holder herself. That such a position of agency was willingly given in respect of the company cards does suggest a similar position was accepted in respect of the cheque books.

HSBC has said throughout that there are cheques that appear to have been signed by Mrs W – having compared available signatures – that Mr W hasn't raised a dispute about. This might, in part, be down to Mr W not discovering some of the cheques until some time after the first was brought to his attention. But I'm not persuaded that explains everything.

A clear example here is a cheque dated 12 January 2022 and made payable to HMRC. The signature on this cheque appears to be the same as that used on the disputed ones payable to Mrs W. It's understandable why this cheque wouldn't be disputed; it appears to be a completely legitimate company payment for WP. But what this cheque does establish is a knowledge and acceptance that Mrs W was signing company cheques in place of Mr W and is in turn evidence of a giving of agency.

It seems more likely than not this arrangement was put in place as a matter of convenience. That's entirely understandable given how Mr W has described the operation of WP. But it wouldn't then be fair and reasonable to say HSBC was correct to pay some cheques and not others where such a position of agency existed, even where the account mandate might not have been strictly adhered to.

HSBC has also shown evidence that Mr W contacted it about adding Mrs W as an account signatory in February 2014. This wasn't ultimately put in place. But I accept HSBC's argument that it does show WP was actively seeking to have Mrs W added as a full signatory to the account. I don't know why the addition didn't happen. But these events do support the existence of a situation where Mrs W was given permission to transact on WP's behalf.

Mr W and Mrs W's roles as co-directors of WP

Mrs W was only removed as a director on 30 April 2022. That means she was a director (and company secretary) for the whole period in which the disputed cheques were paid.

We have no way of compelling Mrs W to provide evidence as to what the funds were used for. She might well argue that the cheques were paid to her for the discharging of company debt. And so this becomes a dispute between two business partners, each a director of WP.

*That the cheques were never questioned, even at the submitting of annual company accounts, goes some way to suggesting a dispute between directors. I'm not saying that is definitely what has happened here. But the possibility is established and Mrs W – in her role as director – might well claim the funds were not misappropriated.*

*It isn't for this service to resolve such a dispute, given it would be a civil matter. A court could likely consider such a dispute and require each party to disclose their financials before settling of the claim. And so proper entitlement to funds could be established.*

*I'm mindful here that Mr W has said the police are involved. But given there has been no prosecution I can't place much weight on this fact.*

*Mr W and Mrs W are going through divorce proceedings*

*Similar to the above it could be argued that the divorce is the most appropriate place for this matter to be settled. I'm conscious here that the complainant is WP. But it seems the disclosure of the events at the heart of this complaint would be part of the divorce proceedings. And those proceedings will involve the disclosure of respective finances before a financial settlement is reached.*

*It follows that these proceedings might be the best place for the dispute, also a civil one, to be resolved. And there would also be a possible risk of double recovery, were Mr W or WP be awarded money by a court that was otherwise refunded by HSBC.*

***My provisional decision***

*I don't intend to uphold this complaint against HSBC UK Bank Plc.*

Ben Murray  
**Ombudsman**