

## The complaint

S Ltd, represented by its director, Ms D, complains that HSBC UK Bank Plc won't reimburse money it lost to a scam.

## What happened

On 8 March 2024, I issued my provisional decision on this complaint. I wanted to give both parties a chance to respond with any further evidence and arguments before I issued my final decision. That provisional decision forms part of this final decision and is copied below.

### *What happened*

*In early 2020, Ms D came across an advertisement which suggested that a public figure was promoting cryptocurrency as a way to make a significant sum of money.*

*Ms D left her details and was contacted by an account manager representing an investment company – "B".*

*Ms D initially made a £250 deposit using a plastic card issued by another financial business. She was provided with a trading platform where she could see the value of her investment and the trading activity that was supposedly taking place. The fraudsters were able to demonstrate that they could quickly increase the value of an investment and this appears to have encouraged Ms D to invest increasingly large amounts.*

*She spoke to a number of different 'brokers' over the 8 or so months she was in communication with the fraudsters. Until May 2020 all of the payments had taken place from her personal account held at a different division of HSBC.*

*There is a dispute about exactly when and why Ms D decided that she'd also put money from S Ltd towards the investment opportunity.*

*Ms D was persistently encouraged to increase the size of her investment in order to maximise returns or increase the level of her account in order to retain the services of her account manager.*

*Ms D made a final payment of £30,000 in November 2020 from her personal account. Following this payment she was unable to contact her account manager and in late December 2020 she reported the matter to HSBC as a scam. Ms D also made extensive enquiries with the recipient banks – those which received her money, though those endeavours appear to have been largely fruitless.*

*The table below shows the payments made from, and credits received to, S Ltd's accounts.*

<i>Date</i>	<i>Amount</i>	<i>Type of payment</i>
<i>26 May 2020</i>	<i>£25,674.36</i>	<i>International payment</i>
<i>28 May 2020</i>	<i>£25,671.07</i>	<i>International payment</i>
<i>29 May 2020</i>	<i>£25,764.59</i>	<i>International payment</i>
<i>30 June 2020</i>	<i>£10,000</i>	<i>Faster payment</i>

27 July 2020	£45,573.59	International payment
7 September 2020	£9,838.87	Credit from fraudsters
	£5,000	Refund
Total outstanding loss		£117,844.74

HSBC decided that it ought to be liable for 50% of the single £10,000 payment that fell under the provisions of the Lending Standard's Board Contingent Reimbursement Model Code ("CRM Code"). It said that it wasn't responsible for the other payments. It also awarded S Ltd £200 compensation for the delays in contacting the receiving bank.

The matter was referred to our service and one of our Investigators upheld the complaint in full. They thought that the activity on Ms D's account stood out as being very unusual and it should have intervened prior to the first payment. Had it done so the Investigator thought the loss to S Ltd would have been prevented.

HSBC didn't agree. It argued that the complaint did not fall under our jurisdiction. It said that Ms D had not invested on behalf of S Ltd, but instead it was a personal investment. And, in order to be an eligible complainant under the Dispute Resolution Rules ("DISP Rules") it was necessary for the transactions in dispute to be made in the course of S Ltd's business.

In support of its argument it noted:

- The investment began as a personal investment, not a business investment.
- In a call between it and Ms D, she confirmed the investment was personal.
- Ms D also said that she'd tried to set up a personal account in order to pay the funds from S Ltd to the fraudsters, but hadn't been able to in time. This didn't seem consistent with the investment being business related.

Our Investigator disagreed and explained why they felt the complaint fell under our jurisdiction. They argued:

- The payments from S Ltd's account took place at the same time as those from her personal account.
- Some of the returns were paid into her business account, indicating that she did intend for the business to profit from the investment.
- Ms D told our service that she was concerned about the future of her business during the pandemic and therefore had invested on behalf of it. Our Investigator found no reason to believe that Ms D wasn't being truthful about this.
- Ms D provided a letter from her accountant (dated in June 2023) that confirmed that she had discussed investing some of the profits from her business at the beginning of the pandemic.

In advance of my final decision I contacted HSBC. I explained that I thought it was mistaken in its belief that the issue of whether Ms D had invested on behalf of her business or personally was a question of jurisdiction. HSBC accepted this and agreed that the complaint fell under our jurisdiction to consider. I did, however, explain that the issue was nevertheless important and, if I were to decide that the investment was personal in nature, I'd be unlikely to find that it was fair to ask HSBC to reimburse S.

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.

*As I've explained above, the first question I need to consider is whether Ms D invested on behalf of her business or personally. That's a finding of significance. If Ms D used S Ltd's funds to invest personally, then S Ltd hasn't suffered a loss. Ms D would have removed the funds from the business – either as a director's loan or dividend. So Ms D would owe S Ltd the money, S Ltd would not have lost any money itself.*

*While I note that it is disappointing that HSBC raised this issue only after our Investigator provided her initial recommendations on this complaint, I'm afraid that I cannot agree that the evidence available supports the finding that Ms D invested on behalf of her business. It follows that I can't ask HSBC to reimburse S Ltd for a loss that it has not suffered.*

*This question is both one of intention – how Ms D viewed the money that she removed from her business account at the point she removed it and one of fact – did S Ltd record the money in its accounts in a way that was consistent with the money having been invested on its behalf.*

*Ms D made a number of statements, both to HSBC and the fraudsters which indicates, in my view, that the investment was personal. And, I've seen no contemporaneous evidence to suggest that Ms D treated the investment as being made on behalf of her business.*

*The first mention I can see of using money from her business for the investment is in late May 2020. The fraudster asked her whether she could take out a loan of £50,000. Ms D appears to have been surprised by this suggestion saying, "Are you joking?". Later that day Ms D said "I might be able to get some more cash rather than borrow." Then following a conversation on 21 May 2020 the fraudster said "You can transfer directly from your business account".*

*I can reasonably infer that during that conversation the prospect of investing S Ltd's funds was discussed and there was some consideration of whether funds would first need to be transferred to Ms D's personal account.*

*While I haven't heard all of the conversations that took place, Ms D never mentions investing on behalf of her business to the fraudsters. It is, in my view, simply seen as a way in which she can acquire more money in order to invest.*

*But that doesn't rule out the possibility that, while not initially considering investing on behalf of her business, she subsequently made this decision. However, later comments don't support this either. She says: "I can't get anything else out of the business account now as need the cash flow to pay out" – again the implication here is that money is being taken out of, rather than being invested on behalf of, S Ltd. And, perhaps most significantly:*

*"When you get a chance can you send through your magic calculation for the ICO please. Also, I have spoken with my accountant today and he said as long as funds for the same amount are paid back into the business account by the end of March 2021 which is our year end, then the tax man will not ask any questions. So far, I've paid out just over £130k via 5 separate transactions."*

*This strongly suggests to me that Ms D did not want to account for funds that had been paid away in her business accounts i.e. – she wanted to simply return the money to the business account as if it had never been removed. At the time this comment was made, of course, Ms D was expecting to receive very significant profits from the investments. That would have presumably meant her business having to pay tax on that profit – yet Ms D does not mention this.*

*I've also considered the phone call between Ms D and HSBC that I referred to earlier. Again, this is contemporaneous evidence and I put more weight on it than later comments. Ms D said:*

*"If I am going to make further payments it would probably just be one, but I'm expecting to get some back, so I'm intending to put back into the account. Umm the only reason, you probably have noticed or you might not have noticed that I did open a personal account last week for a current account and my intention was to pay it from there, but it wasn't set up in time. So my intention is to put that money back into the account"*

*And*

*"It's more personal than business to be honest, more of a personal thing... because I, the business account is over the £85,000 compensation. So I was going to be taking some money out of it anywhere and just stashing it somewhere, but then this opportunity came along so I thought I would do that instead and put the money back in and all is good."*

*Again, this appears to be consistent with all of the other contemporaneous evidence I've seen – Ms D's intention was to remove the money from S Ltd temporarily and then return it in the future.*

*Ms D explains this interaction by saying that the investment was personal in the sense that it wasn't directly related to S Ltd's normal business activities. I'm not entirely persuaded by this – the call was a clear opportunity to state that the investment was being made on behalf of the business. But that wasn't said and, in fact, it was implied again that money was simply being borrowed from the business to be repaid at a later date.*

*Ms D says that she invested on behalf of S Ltd because she was worried about its survival – but there's nothing contemporaneous to suggest that was her intention. And, in any case, money generated from a personal investment could be put back into the business if necessary or be a substitute for income from it – this does not mean that the investment was made on behalf of the business.*

*Turning to the letter written by Ms D's accountant. It states that they had a conversation about investing on behalf of the business. I'm not sure how much weight I can put on this. As I've referenced above, there appears to be other conversations taking place between Ms D and her accountant during this period – they are clearly consulted about the tax implications of being able to return money to the business account.*

*But, I think most telling of all, is how S Ltd actually recorded the payments from its accounts to the fraudster. It recorded them as a director's loan – i.e. money that had been loaned to Ms D. It did not record the payments as investments and did not, once it became clear that the money was lost, record losses to the business. While Ms D has said that she intended to record any profits as sales to the company, for obvious reasons that didn't happen.*

*Overall, I don't think the evidence supports a finding that the payments Ms D made were for business purposes. I've provisionally decided that the payments related to Ms D's personal investments and therefore S Ltd did not suffer a loss as a result of them.*

*I know this will be very disappointing for Ms D and I do not dispute that she has been the victim of a cruel scam and that she's lost a considerable amount of money. But, I can only consider whether S Ltd has suffered a loss and, for the reasons I've explained, I don't think it has. So I don't think that HSBC have made an error in declining to provide further reimbursement.*

### *My provisional decision*

*For the reasons I've set out, I do not intend to uphold this complaint.*

HSBC said it had nothing further to add to my provisional decision. Ms D, on behalf of S Ltd, raised some further points, in summary she said:

- She felt she'd lost out because she'd decided to keep dividends in the business, dividends that she could have withdrawn to her personal account.
- She said she wanted to understand the basis under the DISP rules for the complaint not being upheld.
- It was difficult to understand how my provisional decision and the Investigator's recommendations could be so different.
- It was disappointing that the matter had been brought up so late in proceedings – even after HSBC accepted some responsibility for reimbursing S Ltd.
- She requested a transcript of the call between her and HSBC. She said that it clearly demonstrated that HSBC ought to have had very serious concerns about the activity she was undertaking.
- She wasn't sure how to record the investment in her company accounts and was waiting until the end of the financial year to make any decisions about how the expected profits should be recorded.
- Even if the losses to the investment were recorded in S Ltd's accounts, it still wouldn't have suffered an overall loss that year.
- Ultimately she just wanted to raise additional funds to put into her business and, had the investment been genuine, this would have been evident. The crux of my provisional decision seems to be the question of whether she was investing on behalf of the business or for the benefit of the business. And, given that she is the only shareholder in S Ltd, ultimately its profits and losses are her own and vice versa.
- She questioned whether she could resubmit the complaint in a personal capacity.

### **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 thank Ms D for her thoughtful further submissions. I understand why Ms D feels that she is losing out on something of a technicality and it is regrettable that HSBC did not raise this matter at an earlier point.

To avoid any confusion, as I've already set out, I consider this complaint to fall under our jurisdiction. So, the DISP rules are not the primary basis for deciding this complaint. Instead, I've had to decide whether I can fairly ask HSBC to reimburse S Ltd in circumstances where it may not have suffered a loss.

I understand Ms D's points and accept that she is likely to have been in a different position had she withdrawn money from S Ltd to her personal accounts before paying it away to the fraudsters.

I also appreciate that, as the sole shareholder of S Ltd, its financial position and her own are very strongly linked. Nevertheless, I've set out in some detail in my provisional decision that the contemporaneous evidence I've seen does not point to the investment being made on behalf of S Ltd and the fact that the losses to the investment were not recorded as losses to S Ltd in its accounts only reinforces that finding. I accept that the investment may have been made with the business in mind – in that any potential profits from it could be put back into the business if it struggled. But, as already mentioned, the finances of S Ltd and Ms D are

strongly linked so it's difficult to make any distinction between the investment being for the benefit of S Ltd and being for the benefit of Ms D.

In any case, unfortunately for Ms D, I have to consider, as a matter of fact, whether she was investing on behalf of the business. The evidence I've seen points to the investment being a personal investment and therefore, strictly speaking, S Ltd did not suffer a loss from the disputed payments.

So, while I know this will be very disappointing for Ms D, my final decision remains unchanged from my provisional decision set out above.

### **My final decision**

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 25 April 2024.

Rich Drury  
**Ombudsman**