

## The complaint

D, a limited company, complains that HSBC UK Bank Plc has not refunded money it lost through what it now believes was a scam. D is represented by Q, which brings the complaint on D's behalf.

## What happened

Mr O, director of D, was seeking to wind up D as a company in 2020. He located an insolvency practitioner which appeared suitable to help with this process (a Members Voluntary Liquidation – MVL).

In what follows I will refer to this insolvency practitioner firm as 'P' and to its director as 'Mr A'. Mr A is also the director of another linked entity involved in this matter which I will refer to as 'R'.

In total D sent three payments during what it believed was the liquidation process:

26 April 2021	£1,392
27 May 2021	£48
10 June 2021	£56,042

Payments one and two were in respect of costs. Both were sent to P's main account. Payment one was to cover administration fees, and payment two to cover the cost of a solicitor witnessing Mr O's declaration of solvency.

It appears that payments one and two were used for the purposes Mr O had expected. Having made payment two, he was contacted by a solicitor and his solvency declaration was witnessed. The appropriate papers were lodged with Companies House.

Payment three was sent to an account held by R. This larger payment represented a portion of the assets held by D. The intention behind this transfer was described to D to hold the company's assets in a designated client account while the liquidation process was carried out. Once the liquidation process had concluded the liquidated assets would be transferred from the client account to Mr O.

After making this third payment, Mr O was told Mr A would be liaising with HMRC to carry out the liquidation process. He was told that this would take some time due to backlogs. However, P and R both entered administration around three months later.

The Insolvency Service has later reported that in 2020 Mr A was reprimanded by one of the regulatory bodies. At that time, in September 2020, Mr A had been placed under a licence restriction which prohibited him from taking on any new insolvency appointments. The Insolvency Service reports *"It is understood that [Mr A] has absconded having misappropriated nearly £4 million in estate funds."*

In relation to the estate funds belonging to D, P's liquidator has told D that it has found no trace of the money. It has been only able to locate the nominal sum of £42 remaining on R's account and not removed.

Therefore, D has been left facing a net loss of £56,000 - from the lump sum it paid to what was meant to be a designated client account in the belief those funds would be held in the client account pending the liquidation.

This was reported to HSBC as an Authorised Push Payment Scam (APP Scam). But HSBC didn't accept that it had any liability for the payments D had made.

HSBC is a signatory to the Lending Standards Boards' Contingent Reimbursement Model Code (CRM Code) which in many circumstances can provide reimbursement to the victims of APP scams. But HSBC didn't think any of the payments made by D were APP Scam payments covered by the CRM Code. It thought D had a civil dispute with P. It wasn't liable to refund D under the CRM Code or for any other reason.

D didn't accept this outcome and referred its complaint to this service for an impartial review.

Our Investigator considered everything. He thought the purpose of payments one and two appeared to accord with what D had understood. So those two payments were correctly classed by HSBC as not being covered by the CRM Code. However, the Investigator thought payment three had likely been procured with a fraudulent purpose. The Investigator thought it most likely this had been an APP scam and as such that the CRM Code should apply to this final payment. He said that under the CRM Code HSBC should refund payment three as none of the exceptions to reimbursement under the code could fairly be applied. HSBC didn't accept the Investigator's opinion. In summary, it disputed:

- That it could be established there had been any intent to scam D
- That the CRM Code applied to D's claim because what happened did not meet the CRM Code's definition of an APP Scam

In this, HSBC noted that the relevant part of the CRM Code's APP Scam definition was that:

*"The Customer transferred funds to another person for what they believed were legitimate purposes but which were in fact fraudulent".*

HSBC didn't consider there was evidence to support a finding that the disputed transaction had actually involved fraudulent purposes. It argued that:

- there was a lack of evidence about what happened with D's funds once these reached the account with P;
- it was unclear whether P had in fact carried out work on D's behalf;
- it was unclear whether P or someone acting on P's behalf had caused D's funds to be moved to an account with an apparent fraudster; and,
- it was unclear how Mr A had misappropriated client funds.

HSBC argued that the evidence indicated P was a legitimate firm – and that firm was liable if its director had misappropriated funds held by P. It might see the circumstances differently if D had paid Mr A, but the bank did not believe this to be the case. The two are distinct legal persons. It couldn't be known if P had caused D to make the payment because P intended to misappropriate D's funds, or whether this was something that Mr A decided himself at a later point.

The bank argued that it was equally possible that after taking genuine fees from D, P had intended to perform work for D but that became impossible because Mr A had misappropriated client funds from P (or R). Mr A's actions did not take away P's liabilities to its clients and the loss of D's funds was not a direct consequence of the payment from D's HSBC account.

In light of this disagreement, I have been asked to review everything afresh and reach a decision on the matter.

I issued my provisional findings on the merits of D's complaint on 13 March 2024. In my provisional findings, I explained why I intended to uphold D's complaint and offered both sides the opportunity to submit further evidence or arguments in response. An extract of that decision is set out below and forms part of this final decision:

*In deciding what's fair and reasonable in all the circumstances of a complaint, I'm required to take into account relevant: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to be good industry practice at the time.*

*In broad terms, the starting position at law is that a firm is expected to process payments and withdrawals that a customer authorises, in accordance with the Payment Services Regulations and the terms and conditions of the customer's account.*

*As noted above, where a payment was made as the result of an APP Scam, then the CRM Code can provide additional protection to customers (including micro-enterprise customers such as D). But HSBC argues that the CRM Code should not apply to the payments made by D.*

*I have therefore considered whether I agree that HSBC has fairly reached that conclusion, taking into account the terms of the CRM Code that HSBC has voluntarily agreed to adhere to.*

*In this case what matters in determining whether the CRM Code should apply, is whether the purpose for which the relevant payment was procured was fraudulent.*

*HSBC argues that P was a legitimate business. The starting assumption should be that the payments were made for legitimate purposes.*

*In relation to payments one and two, these were both paid directly to P's main account in the belief that the funds were to be used to pay for a solicitor's declaration and administrative costs such as registering the liquidation on Companies House. These purposes appear to have been fulfilled.*

*The evidence suggests that D broadly received the services paid for through these two payments. Even were they procured for reasons other than it appeared and even if the underlying purpose turned out not to have been legitimate, given that D received broadly what was paid for, I do not consider it would be fair and reasonable for me to require HSBC to consider these payments as having produced a loss that need be reimbursed under the CRM Code.*

*I am not persuaded though that the same applies in respect of payment three.*

*The purpose of payment three as understood by D was that the funds were to be held in a designated client account while the liquidation process was carried out, then to be paid out to Mr O.*

*At the most basic level, that simply did not happen. P failed and Mr A absconded without the liquidation process being concluded. And most significantly from D's point of view, the funds it paid to the client account cannot be located by the liquidator.*

*It seems hard to argue that a financial loss has not been sustained by D.*

*But the question raised by HSBC is at what point that loss occurred. To consider whether HSBC has correctly decided D's third payment is not an APP scam requires me to determine on a balance of probabilities whether the underlying purpose for which that payment was procured was or was not fraudulent.*

*Publicly available information on Companies House shows that P had been trading since 2018, although had only filed one set of accounts prior to entering administration in late 2021. Those records also show that P was principally owned and controlled by Mr A throughout. This is despite the appointment of a second named director in February 2021.*

*There are several other entities listed. HSBC points to what appears potentially to be a linked entity which began trading in 2011. However, that again is shown to be principally owned and controlled by Mr A - again despite the addition of a second director in February 2021.*

*D's first two payments were made to P's main account. The third payment was made to a different account held by a different limited company - R. But again, R appears to have been owned and controlled Mr A (through a family trust in his name).*

*While I accept it is possible that P and R (together with other linked entities) had been trading legitimately previously, I am not persuaded it is likely that these were trading legitimately at the point of D's payments.*

*The relevant facts as I see it are as follows:*

- *Mr A had been prohibited from carrying out any new work as an Insolvency Practitioner (IP). According to information on the Insolvency Service website, the date of that prohibition was 3 September 2020. While Mr A appealed, his appeal was rejected on 24 February 2021.*
- *D entered into agreements with Mr A to act as its liquidator in May 2021. These documents are signed by Mr A.*
- *Therefore, the prohibition had been made prior to Mr O engaging Mr A's services. Yet in the written documentation given to Mr O, Mr A states that he is qualified to act as an IP and will act in D's liquidation.*
- *It seems unlikely that Mr A was unaware he was prohibited from acting as an IP. I find he most likely knew he was not able to act in the liquidation of D.*
- *D's funds were transferred to R, on the premise that these would be held as client funds while the liquidation process was conducted by Mr A.*
- *Companies House shows that R was under the control of Mr A through a family trust in his name. The recipient bank says that R's bank account was set up and controlled by Mr A.*
- *In sending funds to R's account, the money was being moved to an account and a company controlled by Mr A.*
- *Mr A is understood to have absconded with a significant sum of client funds, prior to carrying out the liquidation of D.*
- *D's money would have most likely formed part of those funds given the liquidator can find no trace of the bulk of D's money now.*

*I accept I cannot know for certain what Mr A's intentions were at the time when he took on D's liquidation, nor can I know for certain whether P, R, or associated companies were at the relevant point in time operating legitimately or otherwise.*

*Where there exists uncertainty, as there is here, I must make my findings on a balance of probabilities. The starting presumption here is that the transaction was legitimate. In considering the balance of probabilities I will need to see convincing evidence to persuade me that it is more likely than not it was in reality an APP scam.*

*Having considered the available evidence, and applying a balance of probabilities, I believe it is most likely this was dishonest deception intended to result in D's funds being misappropriated by the person principally in control of P and R, Mr A.*

*That dishonest deception was about the purpose for which D's payment was procured. In particular, I am not persuaded that Mr A (acting through P and R, which he controlled) intended to carry out the liquidation of D when he took the instruction. He could never have done that. Neither could P (or R) ever have done that with Mr A as the IP.*

*I find Mr A knew he could not do so. He was the controlling mind behind P and R. That leads me to believe the underlying purpose behind this transaction was never to return the money as D had been led to believe – rather, it was fraudulent.*

*The evidence convinces me that the intent of Mr A (and hence of the companies he controlled) was that he would obtain significant sums from companies such as D, which he would later misappropriate. The initial smaller payments made to P seem to me most likely intended to give the process the veneer of authenticity or legitimacy. But I think the intention was nevertheless to secure the larger third payment and then for those funds to be misappropriated by Mr A.*

*That is not to say that I do not find HSBC's alternative scenarios possible – they are. But I do not find them more likely than that I have set out above. Rather, I consider there is convincing evidence to persuade me that the scenario I have set out is the most likely in the circumstances of this complaint.*

*It follows that while D made the payment to R for what it believed to be legitimate purposes, R's purpose was in reality not what D had believed. R's purpose was instead fraudulent – the misappropriation of D's money by the person controlling R and controlling R's account. I think it is reasonable to consider that R's intentions were essentially those of Mr A, given that Mr A controlled R (and also P). In short then, D's third payment resulted in a loss of those funds, and the point of loss was the transfer to an account controlled by Mr A.*

*And so I am satisfied that the third payment made by D listed above met the CRM Code's definition of an APP Scam, not a private civil dispute. It follows that the relevant payments are payments covered by the provisions of the CRM Code.*

*I have gone on to consider whether, had HSBC assessed D's claim against the CRM Code as I find it should, the bank would have been liable under the code's provisions to reimburse D.*

*There are provisions within the CRM Code which permit a firm not to reimburse (or not to fully reimburse) a customer for APP Scam payments where the firm is able to establish that certain exceptions can be applied.*

*I have considered whether any of those exceptions can correctly be applied to D's third payment under the provisions of the CRM Code.*

*Having reviewed the circumstances here, and considered the requirements of those exceptions, I am not satisfied that HSBC has demonstrated that any should apply. If HSBC considers there is additional information or evidence it believes could establish otherwise then I invite the bank to provide such in response to my provisional findings.*

*While I will not cover each of the various relevant exceptions to reimbursement under the CRM Code, I do not consider any can be established based on what I have seen so far.*

*In particular I'm not persuaded HSBC could seek to rely on the exception requiring that the payer held a reasonable basis for believing what they did at the time a payment was made.*

*While Mr O, as D's director acknowledges he had uncertainty about P at the time of making payment three, he says he therefore sought advice from HSBC prior to making the transaction, visiting a branch of the bank. Mr O relates that he had a discussion of some length with HSBC staff, prior to the payment being released, but that despite him explaining his concerns, HSBC did not highlight any particular risk posed by the transaction or advise him to take further steps prior to sending the payment. Indeed, HSBC in recent submissions accepts it could not have identified sufficient reason for the payment not to be made. In these circumstances, I am not satisfied that the reasonable basis for belief exception could correctly be applied by HSBC.*

*It does not appear that any other possible recovery of funds is open to D or to Mr O. The insurer with whom Mr O believed a policy had been held in respect of D's funds has since confirmed to Mr O that P did not register for cover in respect of D (as would have been required by the terms of the policy). Mr O has been told there is therefore no possibility of recovery through that route. He was directed by the insurer to register a claim with P's liquidator. P's liquidator has published progress reports on Companies House, but these indicate there is little to no prospect of any funds being paid to D or Mr O.*

*However, I acknowledge HSBC's contention that should any possibility of recovery of D's funds become possible (through either these or any other routes) then it would not be fair or equitable to put D in a position of double recovery.*

*In saying that I don't consider this possibility should prevent HSBC from reimbursing D under the CRM Code now (nor would it have at the time D's director first reported the matter to HSBC). However, I consider it is fair and reasonable that HSBC can choose if it wishes to obtain an undertaking from D to entitle it to any money recoverable elsewhere, whether such recovery was due to D directly, or to another party on behalf of D.*

*In other words, HSBC may require D to enter into an undertaking to assign to the bank any rights to any monies D (or another party on D's behalf) might elsewhere be entitled to recover in respect of this loss. If HSBC asks D to provide such an undertaking, payment of the reimbursement awarded may be dependent upon provision of that undertaking. HSBC may treat D's formal acceptance of the terms of my final decision as being sufficient for this purpose. Alternately, HSBC would need to meet any costs in drawing up an undertaking of this type.*

*Had D not been deprived of these funds it seems likely to me that the liquidation process could have been concluded and the monies distributed to Mr O. I do not know what use those funds would have been put to, but I think it would be fair for interest to be added to the settlement at the rate of 8% simple per year to reflect the time D has been deprived of the use of those funds.*

In my provisional decision, I asked both sides to provide any further arguments or information by 27 March 2024, after which point, I said I would issue my final decision on the matter.

### **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.

#### *Responses to my provisional decision*

D responded to say it accepted my decision. HSBC also responded, but hasn't asked me to consider any further information or arguments.

That means neither side has provided any new information or arguments in response to my provisional decision. I therefore see no reason for me to depart from the outcome proposed in my provisional decision and for the same reasons, as set out above.

### **Putting things right**

I find that HSBC ought to have reimbursed D under the terms of the CRM Code in respect of the third payment listed above. As such HSBC UK Bank Plc should now:

- Refund the net loss (the sum of £56,000) that resulted from payment three; and,
- Add interest to this figure at the rate of 8% simple per year from the date HSBC first declined to consider D's claim under the CRM Code.

### **My final decision**

For the reasons given above and in my provisional decision, I uphold D's complaint about HSBC UK Bank Plc.

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

Stephen Dickie  
**Ombudsman**