DRN-4716664

The complaint

Mr P complains that HSBC UK Bank Plc hasn't refunded him after he fell victim to a scam.

What happened

The background to this complaint is well-known to both parties, so I'll only summarise the key details here.

Mr P was contacted by someone he didn't know on a messaging app. Although they never met, Mr P started to build a friendly relationship with this person, not realising at the time he was talking to a scammer.

After a time, once a degree of rapport and trust had been established, the scammer introduced Mr P to a new way of making good returns on cryptocurrency investment. Mr P has said he looked into the opportunity, including research into the company supposedly behind the investments, and decided to proceed. At the scammer's instruction he sent a total of £140,800 across thirteen payments, between 6 October 2022 and 28 November 2022. It should be noted that the first three payments made hadn't been reported by Mr P as linked to the scam until my involvement in the complaint.

Some of these payments were funded by way of a loan, taken out with HSBC.

During that time Mr P believed he was generating returns on his investment, and was able to withdraw some of his funds. But he realised something was wrong when one of the deals he was involved with came to an end and he couldn't withdraw any more of his returns. He was told he'd have to pay a significant sum in tax, which prompted him to research the parties he'd been dealing with further. He discovered they'd been named as a scammer.

Mr P reported what had happened to HSBC, seeking a refund of his loss. HSBC said it wouldn't refund Mr P as he'd authorised all the payments himself. And it said because the money went to an account in his own name (a cryptocurrency wallet) the protections of the Lending Standards Board's Contingent Reimbursement Model (CRM) Code didn't apply.

HSBC also said that the loss was from Mr P's cryptocurrency wallet, rather than from his account with it. It said it could bear no responsibility for Mr P's loss as a result.

Mr P was unhappy with HSBC's response and brought a complaint to our service. One of our investigators looked at what had happened and said the complaint should be upheld, with HSBC and Mr P sharing responsibly for the loss. In summary, she said:

- Whilst the payments were authorised, HSBC ought fairly and reasonably have been on the lookout for signs that Mr P was at risk of financial harm through fraud;
- The account activity bore the hallmarks of a cryptocurrency scam, including: payment values, payment frequency, the payee, a significant change in account activity;
- She acknowledged Mr P had made payments to cryptocurrency platforms before, but noted the values had been low and transactions were infrequent;
- The account activity and payment characteristics ought to have led to HSBC intervening in the payments so it might question Mr P about them, with a view to avoiding foreseeable loss;

- She was satisfied intervention from HSBC ought then to have led to significant and tailored warnings from the bank, which would more likely than not have prevented any further loss to Mr P;
- Because HSBC had failed to act fairly and reasonably in that regard it ought to bear some responsibility for Mr P's loss; *and*
- She didn't believe Mr P had acted reasonably in sending the payments in the way he did, having followed the instructions of a person he didn't know and without carrying out sufficient checks on the parties involved. All when the promised returns appeared too good to be true.

Those findings led her to conclude that HSBC and Mr P should share responsibility for the loss equally.

Mr P accepted the outcome but HSBC did not. In summary, it said:

- The payment activity wasn't unusual for Mr P and referred to historic payments made from the account;
- Mr P had been engaged with cryptocurrency platforms before the scam, including the one used during it. It pointed to payments of up to £5,000 being made in October 2022, before the reported scam payments.
- These factors meant the payments being made toward the scam didn't stand out as unusual or risky and so there was no need for it to question them;
- It doesn't believe an intervention would have made a difference, questioning whether Mr P would have been honest about what he was doing. In presenting this point HSBC referred to the loan Mr P had taken, where 'home improvement' had been selected as the loan purpose. HSBC said this showed Mr P wouldn't have been honest about the purpose of the payments he was making, given he wasn't honest about the purpose of the lending. It also referred to payments into Mr P's account which had references including 'house' and 'house money' believing this suggested further dishonesty and the disguising of true intentions on Mr P's part;
- Mr P was clearly determined to make the payments and was under the spell of the scammer.

The complaint has been passed to me for a final decision, because an agreement hasn't been reached between HSBC and Mr P. I conducted an initial review of the file and wrote to HSBC on 5 March 2024. I've copied the relevant content of my email below, *in italics.*

Mr P has already accepted the investigator's recommendation that the two parties share responsibility for the loss at 50% each. I'm satisfied that represents a fair and reasonable settlement of the complaint. But I need to set out where that 50% applies from.

I've considered the historic account activity, both in general terms and in consideration of Mr P's previous crypto activity. This initially prompted me to confirm some details with Mr P and his representative, as some transactions close to the scam looked out of place. It's now been confirmed the crypto payments of 6 & 10 October 2022 were also made as part of the scam. That does make sense given the significant uplift in value and frequency of payments those transactions represent. I've also seen copies of the transaction history on the crypto account which shows the money sent on 6 & 10 October is used in the same way as the money that is sent later. That evidences that it was all sent as part of the same scam.

This is important for a couple of reasons. First, it brings more transactions into being subject to the scam and what might be refunded. Second, it removes some of the argument as to what constituted typical account behaviour for Mr P. It can no longer be said that it was normal for him to make large payments toward cryptocurrency. And with that in mind I'm satisfied the point at which HSBC should have stepped in to question the payments was *when Mr P sent the second sum of £5,000 to his crypto wallet on 6 October. That fairly and reasonably accounts for his previous legitimate spending, with what happens from thereon being clearly out of character and unusual. So it's from that point the 50% refund will be applied.*

I don't find the bank's reference to other high value payments alters the outcome I've described above. That's because each of the payments listed was clearly going to a bank account Mr P had very strong links with, including his wife's account. I can also see at least some of those accounts were held with HSBC and so were completely observable to the bank, unlike the crypto wallet. And it is a long-established and accepted fact that payments to crypto wallets do bear a high scam risk, as discussed and warned about by the FCA. That someone might have legitimately invested small amounts into crypto before doesn't mean they couldn't go on to fall victim to a scam. And here, the hallmarks of such a scam were still present and evident.

I don't find the bank's argument on the likely outcome of intervention - where the loan application is discussed - to be persuasive. Mr P might well have put home improvements down as the loan purpose. But clearly such an explanation couldn't have been given about payments being made to a crypto account. And there is really little to no other evidence to suggest Mr P wouldn't have been truthful about what his intentions were. In discussing those intentions, the bank would then have been able to discuss the common features of crypto scams with Mr P, drawing the parallels with the circumstances he found himself in. In turn that ought to have led to very strong warnings against proceeding. I see no reason why Mr P wouldn't have heeded such warnings, particularly if given at an early stage.

Linked to the above, I've also thought about the payment references and that these also refer to 'house'. But, from looking back over statements, it seems more likely than not that these were just existing references on payment instructions that hadn't been changed, given they pre-date the scam.

The final point to make is on the payment of interest. Whilst I understand the point the bank has made on the rate of 8% this service looks for a pragmatic, fair and reasonable resolution to complaints. Here, Mr P source of loss comes from multiple sources. He will have incurred interest and charges on some of those sources where he wouldn't have done so had the scam been averted. The cost of some of the credit he's had to obtain and bear since the scam will have been higher than 8%. He's also had to make payments and go without funds he would otherwise have had to use elsewhere. And so I'm satisfied the 8% is a broadly fair and reasonable way of arranging the settlement.

I let HSBC know that it could either agree to settle the complaint, or that I would issue a final decision confirming the outcome. HSBC has since had three and a half weeks to respond, but I’ve received nothing from it. So I’m proceeding with the 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’m upholding Mr P’s complaint, for the reasons set out in my earlier communication with HSBC.

The starting point at law is that Mr P is responsible for any payments made from his account that he authorised. This position is confirmed is established through the Payment Service Regulations (2017). And the position on authorisation remains unchanged even when a customer has fallen victim to a scam.

However, I am satisfied that, taking into account longstanding regulatory expectations and requirements, and what I consider to have been good practice at the time, HSBC should fairly and reasonably have been on the look-out for the possibility of APP fraud and have taken additional steps, or made additional checks, before processing payments in some circumstances – as in practice all banks, including HSBC, do.

My email to HSBC of 5 March 2024 clearly set out my intention to uphold Mr P's complaint along with the reasons for doing so. I was – and remain – satisfied HSBC ought fairly and reasonably have stepped into to question the payments, and that such intervention would have made a difference here.

As I've received no further response from HSBC, and thereby no counter to the findings made, I see no reason to depart from what I've said before. And I won't set out all the same reasoning again here.

Putting things right

On Mr P's acceptance, HSBC should:

- Refund 50% of the loss from the second payment of £5,000 on 6 October 2022;
- A deduction for returns received and funds recovered can be made from the above;
- Pay 8% per year simple interest on the refund, calculated from the date of loss to the date of settlement.

My final decision

I uphold this complaint against HSBC UK Bank Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 28 April 2024.

Ben Murray
Ombudsman