

## **The complaint**

Mr O complains that HSBC UK Bank Plc trading as first direct ('first direct') won't refund the money he lost when he didn't receive materials he ordered.

## **What happened**

In August 2022 Mr O paid a company I'll refer to in this decision as H £13,696.44 for building blocks. The amount paid was a 50% deposit. Mr O didn't receive the blocks and says he is the victim of a scam. The manufacturer of the blocks told Mr O that it hadn't received an order from H since July 2022, and H has gone into voluntary liquidation. Mr O says he is one of forty victims.

First direct noted that H was a legitimate company at the time of payment and is now being dealt with by liquidators. It said that Mr O has a civil dispute.

Mr O was unhappy with first direct's response and brought a complaint to this service. He provided a definition of fraud and said that when his order was placed H was insolvent and had no chance of providing the materials he ordered.

### *Our investigation so far*

The investigator who considered this complaint didn't recommend that it be upheld. She said that Mr O had a civil dispute that isn't covered by the CRM Code and in these circumstances, first direct has no power to try to recover Mr O's lost funds.

Mr O didn't agree with the investigator's findings. He said in due course evidence will be provided by the liquidator to demonstrate that there was no chance of him receiving the product he ordered, and this amounted to fraud. Mr O has also provided evidence that the police are investigating H and have sent Mr O a questionnaire to get an overview of the situation.

The complaint has now been passed to me to decide.

## **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 sorry to hear about the situation Mr O has been left in. He has paid out a considerable sum of money but has not received the goods he expected. I don't have the power to decide any dispute between Mr O and H though. My role is limited to looking at whether first direct has treated Mr O fairly.

As a starting point in law, Mr O is responsible for payments he has instructed first direct to make. Unfortunately, there is little protection available to him for a bank transfer payment like this.

I've considered whether the CRM Code applies and, if so, whether first direct should have reimbursed Mr O under the provisions of it, and whether it ought to have done more to protect him from the possibility of financial harm from fraud.

The CRM Code provides protection to scam victims. Under the CRM Code, the starting principle is that a firm should reimburse a customer who is the victim of an APP scam (except in limited circumstances). But the CRM Code only applies if the definition of an authorised push payment (APP) scam, as set out in it, is met. I have set this definition out below:

*...a transfer of funds executed across Faster Payments...where:*

- (i) The Customer intended to transfer funds to another person, but was instead deceived into transferring the funds to a different person; or*
- (ii) The Customer transferred funds to another person for what they believed were legitimate purposes but which were in fact fraudulent.*

This is the definition that is relevant to my consideration of Mr O's complaint.

The CRM Code is also explicit that it doesn't apply to private civil disputes. The wording in the code is as follows:

*"This Code does not apply to:*

- b) private civil disputes, such as where a Customer has paid a legitimate supplier for goods, services, or digital content but has not received them, they are defective in some way, or the Customer is otherwise dissatisfied with the supplier."*

In other words, the CRM Code isn't a general protection for customers against non-receipt of or defective goods or services. It only applies if it can reasonably be established that there was the intent to defraud the customer from the outset and that the high bar required for criminal fraud would likely be met.

So, I need to consider whether Mr O was induced to make a payment with the intent to defraud him from the outset. That would mean the evidence supports a finding that it's more likely than not (rather than just as likely) that H obtained payment for a purpose that was different to the one Mr O thought he was making the payment for because of dishonest deception. It also means being able to exclude, on the balance of probabilities, the alternative possibility that this is simply a matter of H breaching a legitimate contract with Mr O.

It's important to note that it isn't for first direct to investigate H or to prove that H wasn't acting fraudulently. It is for Mr O to provide evidence to prove these allegations.

I appreciate that H didn't provide the materials Mr O ordered, but this isn't enough to prove that at the time Mr O made his payment H didn't intend to fulfil the contract. At the time Mr O made the payment H was a UK incorporated company that had been operating since February 2017. In August 2023 voluntary liquidators were appointed, but this was some time after Mr O made his payment.

Although Mr O says the goods didn't exist and H had no intention of providing them, there is no evidence to support these allegations. The only evidence Mr O has provided from the liquidator is that there are a large number of unfulfilled orders but the documents it has seen don't indicate which customer each order to the manufacturer relates to, so it is unable to say which orders were passed on by H. And the police investigation is at an early stage so that there is currently no evidence of criminal intent.

The investigator contacted the firm holding the account that received Mr O's payment. While I cannot detail the information that the recipient firm has provided in response, that information is consistent with H's business and the bank had no concerns at the time.

I appreciate how disappointing this answer will be. Mr O has lost a lot of money as a result of H's failure to provide the materials agreed. But I can't exclude the possibility that H entered the agreement in good faith, intending to provide the building blocks but was unable or unwilling to fulfil the agreement for some reason. Businesses can fail or be mismanaged

such that agreements are breached and agreed services aren't provided. The evidence doesn't allow me to conclude it's more likely than these alternative possibilities that H intended to steal Mr O's money from the outset and never had any intention of fulfilling the agreement.

I have reached a decision based on the evidence that is available now. If material new evidence comes to light at a later stage, Mr O may bring another complaint to this service.

I also don't consider that if first direct had intervened when the payment was made it would have had any concerns that Mr O's funds were at risk.

Overall, I can't fairly hold first direct responsible for Mr O's loss.

### **My final decision**

For the reasons stated, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 6 May 2024.

Jay Hadfield  
**Ombudsman**