DRN-4785742

The complaint

M complains HSBC UK Bank Plc won't reimburse £75,000 it lost to an investment opportunity that it now considers to be an Authorised Push Payment (APP) scam.

What happened

The background to this complaint is familiar to both parties, so I'll only refer to some key events here.

In early 2021, M was made aware of an investment opportunity in a UK based lighting technology company, which I'll refer to as 'P', by one of its business associates who was also considering investing. The proposed investment was to loan funds to P, for a project to provide proprietary lighting technology for the cultivation of medical grade cannabis oil on an overseas site that P had leased ('the project'). In return M would receive shares in P, which would generate future dividends. M understood that P would repay the loan after a minimum term of 12 months.

Having conducted significant due diligence - including researching the companies involved in the scheme and speaking at length with P's founder and director ('Mr N') - M decided to invest. On 29 January 2021, M made a £75,000 payment from its HSBC Business Current Account to P.

M expected to be repaid the loan amount 12 months after its investment. This did not happen. P informed investors that the COVID pandemic had impacted its plans. It later advised that it had a buyer who was willing to repay loans, but shareholders would need to relinquish their shares. M expected this transaction to take place imminently and that the loan would be repaid by December 2022. But in November 2022, M was contacted by a fellow investor who had visited the overseas facilities, which investors had been told were in full production, and discovered only empty buildings. At this point M and other investors realised that P was operating an elaborate scam.

In November 2022, M contacted HSBC for help recovering its lost funds. HSBC issued a final response in March 2023. It acknowledged the length of time that had passed since M raised its scam claim, but explained it was still not in a position to reach an outcome due to the complexity of the case. In July 2023, in response to M chasing for an update, HSBC confirmed that it would not be reaching a conclusion on the case until the police completed its investigation and an industry wide decision had been made.

Unhappy with HSBC's response, M referred its complaint to the Financial Ombudsman. Our Investigator upheld the complaint. She was persuaded, on balance, P was operating a scam. And as HSBC had not established that any exceptions to reimbursement under the Lending Standard's Board Contingent Reimbursement Model Code ('the CRM Code') applied, it should refund M in full, plus 8% interest.

Since M referred its complaint to the Financial Ombudsman, we have also received complaints from other investors of P. While considering these complaints we have become aware of other evidence and information relating to P, which I consider to be relevant to the

consideration of M's complaint. This includes evidence received from someone I'll refer to as 'Mr C', the fellow investor who travelled to the overseas site and uncovered the likely scam.

M accepted our Investigator's opinion. HSBC confirmed it would not settle the complaint but provide no further commentary or response to our Investigator's findings.

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.

Having done so, I'm upholding this complaint for largely the same reasons as our Investigator. I'm persuaded the evidence supports that there was a significant difference between what M thought about the investment and what P had in mind regarding the purpose of the payments. I'm also satisfied that the purpose was substantially different because of dishonest deception on P's part. I'll explain why.

Can HSBC be held responsible for M's loss?

When considering what is fair and reasonable, I'm required to take into account relevant law and regulations; regulatory rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.

In broad terms, the starting position in law is that a firm is expected to process payments and withdrawals that a customer authorises, in accordance with the Payment Services Regulations 2017 (PSRs) and the terms and conditions of the customer's account. However, where the customer made the payment because of the actions of a fraudster, it may sometimes be fair and reasonable for the provider to reimburse the customer even though they authorised the payment.

The CRM Code

HSBC was a signatory to the voluntary CRM Code, which provided additional protection to scam victims while it was in place. Under the CRM Code, the starting principle is that a firm should reimburse a customer who is the victim of an Authorised Push Payment (APP) scam (except in limited circumstances). But the CRM code only applies if the definition of an APP scam is met. Here the relevant definition is set out in DS1(2)(a)(ii) of the Code:

> *"…a transfer of funds…where*
> *(ii) The customer transferred funds to another person for what they believed were legitimate purposes but which were in fact fraudulent."*

The CRM Code is explicit that it doesn't apply to all "*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."*

This makes it clear that *"private civil disputes"* between the paying bank's customer and a legitimate supplier aren't included, even if the relevant goods or services were never received or were defective. To take the matter beyond a mere private civil dispute between the parties, there must have been a crime committed against the payer in fraudulently obtaining their payment for purposes other than the legitimate purpose for which the payment was made.

But that doesn't mean that a claimant under the CRM Code needs to meet the criminal standard of proof ("beyond reasonable doubt"). In line with the general approach taken by the Financial Ombudsman when deciding complaints that are referred to us, I only need to be persuaded on a balance of probabilities, the same standard of proof that is required in civil cases. So, I would need to see evidence that convinces me it's more likely than not that fraud has occurred, and therefore that M lost money to an APP scam. If I do find that is the case, then the CRM code would apply, and M would be entitled to reimbursement of its loss unless HSBC could show that any of the exceptions to reimbursement set out in the code apply.

Can HSBC delay making a decision under the CRM Code?

The CRM Code says firms should decide whether to reimburse a customer without undue delay. There are however some circumstances where I need to consider whether a reimbursement decision under the provisions of the CRM Code can be delayed. If the case is subject to investigation by a statutory body and the outcome of that investigation might reasonably inform the firm's decision, the CRM Code allows a firm, at section R3(1)(c), to wait for the outcome of that investigation before making a reimbursement decision.

To date HSBC has not provided either M or the Financial Ombudsman with an answer to M's scam claim, and it has said it will await the outcome of the police investigation before reaching a decision. While HSBC has not expressly stated as much, it appears to be relying on R3(1)(c) to account for its delay in providing an answer to the scam claim. But whether R3(1)(c) applies or not, this does not impact M's right to refer a complaint to the Financial Ombudsman. Nor does it impact the Financial Ombudsman's ability to provide an outcome if we consider we have sufficient evidence to reach a fair and reasonable outcome.

Is it appropriate to determine M's complaint now?

I understand that a police investigation is still on-going, although its progress is unknown. I also understand that the liquidator's enquiries are continuing.

There may be circumstances and cases where it's appropriate to wait for the outcome of external investigations and/or related court cases. But that isn't necessarily so in every case, as it may be possible to reach conclusions on the main issues based on evidence already available. And it may be that investigations or proceedings aren't looking at quite the same issues or doing so in the most helpful way. I'm conscious, for example, that any criminal proceedings that may ultimately take place might concern charges that don't have much bearing on the issues in this complaint; and, even if the prosecution were relevant, any outcome other than a conviction might be of little help in resolving this complaint because the Crown would have to satisfy a higher standard of proof (beyond reasonable doubt) than I'm required to apply (which – as explained above – is the balance of probabilities).

As for investigations by liquidators, these are normally made for the purpose of maximizing recoveries for creditors. Sometimes they lead to civil proceedings against alleged wrongdoers, or against allegedly implicated third parties. But the claims may not be relevant to the issues on the complaint. And, even if they are potentially relevant, such claims are quite often compromised without a trial and settle on confidential terms, so the outcome is of little benefit to the Financial Ombudsman.

To determine M's complaint, I must ask myself whether, on the balance of probabilities, the available evidence indicates that it's more likely than not that M was the victim of a scam rather than a failed investment. But I wouldn't proceed to that determination if I consider fairness to the parties demands that I delay doing so.

I'm aware that M first raised its scam claim with HSBC in November 2022, and referred its complaint in June 2023, and I need to bear in mind that the Financial Ombudsman is required to determine complaints quickly and with minimum formality. With that in mind, I don't think further delaying giving M an answer for an unspecified length of time would be appropriate unless the delay is truly required for the sake of fairness to both parties. So, unless a postponement is likely to help significantly when it comes to deciding the issues, bearing in mind the evidence already available to me, I'm not inclined to think it fair to put off the resolution of the complaint.

I'm also aware that P is under liquidation. This might result in some recoveries for P's creditors, or even theoretically its shareholders. It's unlikely that victims of this scheme (as unsecured creditors) would get anything substantive if there are secured creditors, given recoveries would initially be for any secured creditors. That said, in order to avoid the risk of double recovery, I think HSBC would be entitled to take, if it wishes, an assignment of the rights to all future distributions to M under the liquidation process in respect of its £75,000 investment before paying anything I might award to it on this complaint.

For the reasons I discuss further below, I don't think it's necessary to wait until the outcome of a statutory body investigation for me fairly to reach a decision on whether HSBC should reimburse M under the provisions of the CRM Code.

Has M been the victim of an APP scam, as defined in the CRM Code?

As set out above, the CRM Code only applies if the definition of an APP scam is met. The CRM Code wouldn't apply to a payment made for a genuine investment that subsequently failed.

As there's no dispute that M's funds were transferred to the intended recipient, I don't consider section DS1(2)(a)(i) of the definition to be relevant to this dispute. Therefore, for there to have been an APP scam, M must have transferred funds to P for what it believed were legitimate purposes, but which were in fact fraudulent, as set out in section DS1(2)(a)(ii).

I've therefore considered whether M's intended purpose for the payments was legitimate, whether the intended purposes of M and P were substantially aligned and, if not, whether this was the result of dishonest deception on the part of P.

M lent P £75,000 on 29 January 2021, believing it was part of an investment and would be used for funding the project. M understood the loan would be repaid after a fixed period of 12 months. It also understood that it had acquired shares in P and would receive dividends in the short-term if certain conditions were met. I haven't seen anything to suggest M didn't think the investment with P was legitimate.

I've then considered whether there is convincing evidence to demonstrate that P's purpose in receiving M's payments was fraudulent. That is, whether P's purpose must have been to misappropriate M's funds or otherwise deprive it of money, rather than use it for the purpose M believed.

The Financial Ombudsman contacted the police force investigating the matter as well as the liquidator overseeing P's and associated companies' liquidation. Although attempts to obtain further information from the police were unsuccessful, the liquidator shared their preliminary findings from its investigations to date.

The following observations the liquidator made about P and its main director – Mr N – are of particular relevance to this complaint:

- Following P's incorporation in September 2017, while an undischarged bankrupt, Mr N acted as a de facto director of P and promoted the company as a successor to another company he used to be a director of before it went into liquidation. Mr N was appointed a director of P in June 2018, prior to his discharge from bankruptcy. As an undischarged bankrupt, Mr N was prevented from being involved in the formation or management of any company.
- Between September 2017 and July 2018, when Mr N was an undischarged bankrupt, nearly 34% of the investors' money was drawn out by him via another company he was a director of, or to his personal account, or otherwise applied towards lifestyle spend.
- Between March 2018 and July 2019, Mr N made rental payments every month in respect of the property he and his family were living in. And between September 2018 and September 2019, nearly 32% of investments into P were applied towards purchasing that property.
- Between January 2020 and April 2020, repayments to investors were made which were drawn from new investor funds. The pattern of using new investor funds to repay historic investors continued subsequently.

Given the substantial size of these payments and Mr N's misconduct as a bankrupt, I consider this is powerful evidence that P's true role was to dishonestly raise money from investors to fund Mr N's lifestyle and make repayments to earlier investors.

Another investor, who has also since brought a complaint to the Financial Ombudsman, has provided an email they received from one of the former directors of a company which was contracted to grow medicinal cannabis in the overseas jurisdiction. I note that the director has said his company had significant funding problems with P, from as early as November 2019. The email goes on to say that by that point, his company had used all its capital and had committed $2.5 million. It no longer controlled the land and had difficulties raising additional funds. Although P promised to lend it $1 million, that funding never arrived. The site was left in a state of disrepair, and the director's company in ruins. The director concludes the email by saying he believes that P was set up as an investment fraud, given the initial contract signed by both parties for the project was never funded.

A review of bank statements of P's account from the relevant time supports the director's claim that the promised sum wasn't sent. From what we've seen, it appears that only around £83,000 was sent to the company during the relevant period. This leads me to conclude that P had no intention – by the time of M's payments – to fulfil its obligations in relation to the project, and therefore it also had no intention to use M's funds as it had led it to believe it would. Instead, based on what the liquidator has noted, it appears that M's funds were used largely for Mr N's personal benefit and repayments to earlier investors.

The Financial Ombudsman has also seen an email from the general manager of the company that P engaged with in 2018 to carry out construction at the overseas site. The email states that the construction company experienced multiple delays in receiving payments, and in early 2021 it was asked to stop all work immediately and leave the site. At the time, construction hadn't finished, and the site didn't have electricity or water. The general manager also states that to his knowledge, the site has never had any grow lights installed, nor grown cannabis. The email from the former director of the company which was contracted to grow medicinal cannabis corroborates that evidence, stating that lighting was never provided nor cannabis grown on the site.

The information provided by the third parties which I've mentioned above is completely at odds with the letter P sent to shareholders in November 2021 which included 'sensitive' images of the 'up and running' facility, one of which purported to show the cannabis flower cultivation grow room. One of the investors has alleged that these images were taken from third-party websites. And a review of the website links the investor claims the images were taken from does support this allegation. While P's newsletter was written after M made its initial investment, I do consider it relevant to the extent that it provides evidence of P's willingness to deceive investors about the use of their funds.

I also understand that in November 2021, P agreed to make a payment of £2.5 million to another company for the deal it had entered into – to supply P's proprietary lighting in return for a percentage of that company's revenue. When the funds didn't arrive, Mr N claimed to have sent the payment and provided a screen shot of the payment confirmation to evidence this. We've seen evidence to suggest that this was not true, no payment was sent from the claimed account.

We have also been provided with an email from the police to one of the investors where they have confirmed that none of the accounts held by P, connected companies, or Mr N, had a balance that could have cleared that payment.

I consider that this evidence supports a conclusion that Mr N and P were more than capable of the level of dishonesty required for an APP scam such as the one M alleges it fell victim to.

Overall, having carefully considered the information available, and given the findings I've made above, I'm persuaded that P's purpose was not aligned with what M believed when it made the payment in 2021. M made the payment believing it was funding the project, whereas, in truth, P had the dishonest intention of diverting a substantial part of the money to support Mr N's lifestyle, repay earlier investors, and, as and when necessary, deceiving investors that P was establishing and conducting viable business operations.

So, I think the circumstances here meet the definition of an APP scam as set out under the CRM Code.

Returning to the question of whether in fairness I should delay reaching a decision pending developments in the liquidation or police enquiries, I've explained why I should only postpone a decision if I take the view that fairness to the parties demands that I should do so. In view of the evidence already available to me, however, I don't consider it likely that postponing my decision would help significantly in deciding the issues. The liquidators have already expressed their views. And as regards the police's investigations, there's no certainty as to what, if any, prosecutions may be brought in future, nor what, if any, new light they would shed on the evidence and issues I've discussed.

Is M entitled to a refund under the CRM code?

Under the CRM Code, the starting principle is that a firm should reimburse a customer who has been the victim of an APP scam, like M. But a firm may choose not to reimburse a customer if it can establish that one or more of the exceptions to reimbursement apply (R2(1)). It goes on to state that Firms should assess whether any exception established would have had a material effect on preventing the APP scam from taking place.

As HSBC has not yet answered M's scam claim, it's unclear if it considers any of the exceptions to reimbursement apply. I have therefore considered whether I think it's more likely than not HSBC could rely on any of the exceptions in this case.

Having carefully considered the circumstances of this complaint; I consider the most relevant exceptions are whether M ignored an effective warning in relation to the payment being made; or M made the payment without a reasonable basis for believing that:

- the payee was the person the customer was expecting to pay;
- the payment was for genuine goods or services; and/or
- the person or business with whom they transacted was legitimate.

Did M ignore an effective warning?

The CRM Code sets out that a firm may choose not to reimburse a customer if they ignored *"Effective Warnings"* – as defined in SF1(2) – *"by failing to take appropriate action in response to such an Effective Warning."*

HSBC has provided evidence that it intervened before processing M's payment to P. It initially held the payment and required M's director ('Mr T') to speak with the fraud team before it processed the payment.

During the call, the fraud agent asked Mr T what the payment related to; how he'd obtained the payment details; and how he'd heard about the investment. The agent asked Mr T if he was *"confident the account details were correct"* and *"sure it wasn't a fraud or a scam".* The agent suggested some steps Mr T could take to reassure himself, such as checking the account details again or making a test payment. She provided some general scam guidance about investment scams following cold calls and the risk of cloned firms, she also warned Mr T about safe account scams. Mr T explained the steps he'd taken to reassure himself the investment was legitimate, and the payment details were accurate.

Having listened to this call, I don't think HSBC could reasonably establish that Mr T, on behalf of M, failed to take any appropriate action in response to HSBC's warning. And in any event, given the sophistication of this scam, and what was known at the time of M's payments, I'm not persuaded that any steps HSBC or Mr T could have taken at the time would have had a material effect on preventing the scam.

As such, I don't think HSBC could reasonably choose not to reimburse M on the basis that it ignored an *"Effective Warning"*.

Did M have a reasonable basis for belief?

Thinking next about M's reasonable basis for belief, the investment material I've reviewed appears professional, and there was nothing in the public domain at the time about P from which M could have reasonably inferred that a scam was taking place.

M has also explained that it conducted extensive due diligence before deciding to invest. This involved an extensive review of material provided - including the sales documentation, financial predictions and contractual relationship documents; research on Companies House into the various companies and their directors and shareholders; an extensive telephone meeting with Mr N as well as conversations with existing shareholders, who'd carried out their own due diligence. None of these checks or investigations highlighted anything that I would have expected M to have had concerns over at the time.

Overall, I'm satisfied M had a reasonable basis to believe the payment was for a genuine investment and that P was operating legitimately.

With this in mind, I don't think HSBC could establish that any of the exceptions to reimbursement under the CRM Code apply here. It follows that it should refund the money M lost in full.

Putting things right

I've thought carefully about whether interest should be added to the refund M is due from HSBC. Having considered the available information, including submissions from third parties which I consider HSBC could have obtained if it wanted to when it received M's claim, I consider that HSBC should have reimbursed M within 15 business days of receiving its scam claim – based on the expectation set out in R3(1) of the CRM Code. As such, I think it is fair and reasonable that HSBC add interest to the refund from 9 December 2022, which is 15 business days after it received M's scam claim, to the date of settlement.

Outside the provisions of the CRM Code, I consider it unlikely that any further intervention by HSBC at the time of the payments would have positively impacted M's decision-making or prevented its loss. I don't think either party would have likely uncovered sufficient cause for concern about P such that M would have chosen not to proceed. As such, I don't think HSBC could reasonably have prevented the loss, and so it can't reasonably be held responsible for the loss of use of the money until it became aware of the scam and was required to consider reimbursement under the CRM Code.

With that in mind, in order to put things right, I direct HSBC to:

- refund M the £75,000 payment made as a result of the scam; and
- pay simple interest at 8% per year on the amount refunded (less any tax lawfully deducted), calculated from 9 December 2022 to the date of settlement.

As P is now in liquidation, it's possible M may recover some further funds in the future. In order to avoid the risk of double recovery, HSBC is to take, if it wishes, an assignment of the rights to all future distributions under the liquidation process in respect of this £75,000 investment before paying the award. If HSBC elects to take an assignment of rights before paying compensation, it must first provide a draft of the assignment to M for its consideration and agreement.

My final decision

I uphold this complaint and direct HSBC UK Bank Plc to put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask M to accept or reject my decision before 4 December 2025.

Lisa De Noronha
Ombudsman