

The complaint

Mr Z complains on behalf of his mother (Mrs Z) that HSBC UK Bank Plc didn't do enough to prevent the loss she suffered when a third party made transfers from her account.

Mr Z has been appointed as one of her deputies by the Court of Protection.

What happened

The detailed background to this complaint is well known to both parties. So, I'll only provide a brief overview of the key events here.

In March 2019 a Lasting Power of Attorney (LPA) for property and financial affairs was set up for Mrs Z and registered with the Office of the Public Guardian (OPG). There were two attorneys who I understand were her sons, Mr Z and Mr Z2. The LPA document records that the attorneys could act 'jointly and severally'.

In April 2019 the LPA was registered with HSBC. Mr Z2 had online banking access to his mother's accounts. Mrs Z's statements show that between November 2019 and November 2021 around £248,000 left the account to Mr Z2's account with another bank. Mr Z thinks this is something HSBC ought to have picked up on and that they failed to safeguard Mrs Z's funds. The matter was reported to the police, and in November 2021 Mr Z contacted HSBC to raise his concerns. HSBC inhibited the accounts.

HSBC say that in March 2022 they were contacted by the OPG indicating that Mr Z2 was no longer permitted to make decisions on Mrs Z's account and appointing a Mrs M as a new attorney. HSBC responded to the complaint but said there had been no bank error and the matter was referred to our service.

In May 2023 I issued a provisional decision indicating I wasn't minded to uphold the complaint. Further submissions were made by Mr Z and it transpired that due to what had gone on, the OPG had suspended all LPA's. We explained that as we didn't have evidence of anyone (at that time) with a legal authority to represent Mrs Z (and she lacked the capacity to represent herself), that the complaint couldn't progress. We explained that once someone able to represent Mrs Z was appointed, we'd re-open and consider the complaint.

In May 2024, Mr Z provided a court order from the Court of Protection evidencing that he (amongst others) had been appointed as a deputy for Mrs Z. The complaint has accordingly been re-opened. In the meantime, there have been significant developments. I understand Mr Z2 has been convicted in relation to the removal of around £250,000 from Mrs Z's accounts. So it was appropriate to issue a further provisional decision setting out my updated thoughts on this complaint.

In June 2024 I issued a further provisional decision in which I said:

"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 intending to reach a different outcome to that of my original provisional decision. I'll explain why.

Mr Z2 was authorised by the LPA in place at the time to make the payments he did from Mrs Z's account. So under the relevant regulations (The Payment Services Regulations 2017, 'PSR's), they were all 'authorised transactions'. The impact of this is that Mrs Z would usually be liable for the payments on that basis.

But that isn't the end of the story, I now accept (based on the court conviction), that the removal of funds by Mr Z2 from Mrs Z's account was the misappropriation of that money. And HSBC should fairly and reasonably act in their customer's best interests and try (where possible) to protect against the misappropriation of funds.

The evidence shows that Mrs Z had made transfers to Mr Z2's account prior to the LPA being registered with HSBC. This isn't surprising as it is common for family members to transfer money to each other from time to time. I've seen evidence of credits from and payments to Mr Z2 from January 2018 which support this being the case. As such, I think it can fairly be said that there was an established history of payments between the accounts. And I can understand why HSBC would have taken some reassurance from that link when thinking about what was unusual or what might have presented a risk of financial harm to Mrs Z.

Mrs Z's account activity between May and October 2019 (with the exception of one larger internal transfer in May 2019) typically only involved payments that totalled a few hundred pounds each month.

In November 2019 there was a transfer made to Mr Z2's account of £2,800 – this was an increase compared to the usual monthly expenditure from the account. In December 2019 there were three transfers to Mr Z2 which together totalled £4,500 alongside the more regular modest expenditure. In January 2020 there were eight transfers to Mr Z2 which together totalled £25,000. This increased again in February 2020 with a further seven transfers to Mr Z2 totalling just over £51,000.

And between 5 and 12 March 2020 the following account activity took place:

Date	Amount	Notes
5 March 2020	£10,000 credit	Incoming transfer from Mrs Z's Cash ISA
5 March 2020	£11,000	Outgoing payment to Mr Z2
8 March 2020	£16,000 credit	Incoming transfer from Cash ISA
8 March 2020	£4,000	Outgoing payment to Mr Z2
10 March 2020	£11,000 credit	Incoming transfer from Cash ISA
10 March 2020	£13,000	Outgoing payment to Mr Z2
11 March 2020	£15,000 credit	Incoming transfer from Cash ISA
11 March 2020	£15,000	Outgoing payment to Mr Z2
12 March 2020	£14,000 credit	Incoming transfer from Cash ISA
12 March 2020	£14,000	Outgoing payment to Mr Z2

The balance of Mrs Z's ISA reduced from around £212,000 (in November 2019) to around

£138,000 by the end of February 2020. And the balance by 12 March 2020 was down to around £72,000.

By 12 March 2020, there were several factors going on with the account which I think would have indicated the potential that Mrs Z was at risk of financial harm from fraud:

- There had been a significant change in the way the account was being operated.
- There had been a progressive (and significant) increase in the amount being transferred from the account each month.
- The vast majority of the funds were being sent to one individual, Mr Z2.
- The pace of the withdrawals had increased with daily outgoing transfers being requested on 10, 11 and 12 March 2020.
- The Cash ISA funding this activity was being drained of funds with significant withdrawals, losing their tax efficient status in the process.

HSBC should fairly and reasonably be monitoring their accounts to combat various risks including the misappropriation of their customer's funds. The combination of the above factors means I think HSBC fairly and reasonably should have had concerns about a potential risk to Mrs Z that they ought to have investigated at the time. And as I've mentioned above, the only factor that might have provided some reassurance was that these payments were being made to an account that was an established beneficiary. But amongst all the possible explanations, which would include that this activity was all legitimate, would be that funds were being misused by Mr Z2. I don't think HSBC ought to have allowed further transfers to Mr Z2 from the account after 12 March without first taking some additional steps.

I think a prudent and proportionate response by HSBC likely would have involved one (or more) of the following options.

1. Asking Mr Z2 to evidence what he did with the money once it had arrived in his account. Specifically to show that it had been spent or invested for Mrs Z's benefit.
2. Sharing the account activity with Mr Z (the other LPA at the time) to seek to confirm its legitimacy.
3. Flagging their concerns to the OPG.

The evidence in the public domain from Mr Z2's trial suggests that the funds were spent on car payments, holidays and a failed business venture. So, I don't think it's likely he could have evidenced that the payments were for Mrs Z's benefit. Mr Z becoming aware of what had happened prompted the discovery of the crime, and the evidence suggests that the OPG suspended all the LPA's when they became aware. So whichever of these options had happened, I think it's more likely than not that the net result would have been the same – that is the prevention of any further loss of Mrs Z's funds.

I appreciate Mr Z might argue that this intervention by HSBC ought to have come sooner. Indeed, his response to my original provisional decision includes reference to some guidance from The Investing and Saving Alliance (TISA, of which HSBC is a member). Specifically their 2019 paper "Powers of Attorney – Good practice for ID&V, due diligence & fraud."

I've of course thought about this. I'm not persuaded that HSBC being a member of TISA obligates them to follow all of their guidance as a matter of course whenever a LPA is in place. The TISA guidance itself says that "From a client relationship management perspective, it is worth noting that the OPG may contact the attorney or donor directly as a result of any concerns... This has the potential for difficult conversations if suspicion proves

to be unfounded, so firms should be confident of the evidential basis for reporting in this way.”

The TISA guidance does include some suggestions of measures that a bank might wish to take. But I don't agree all these suggestions can fairly be considered to be good industry practice such that I could fairly criticise HSBC for not implementing them at the relevant time. I accept that 'had' some of these steps been taken (for example the sharing of statements with both LPAs) that Mr Z2's dishonesty would have come to light sooner.

But I also have to balance this with the fact that (at the relevant time), there were two LPA's able to act on Mrs Z's behalf. And whilst I understand Mr Z largely placed his trust in Mr Z2, he also had the ability to monitor his mother's accounts. And in a similar way 'had' he chosen to do so, things most likely would have come to light sooner.

I also accept that based on the account activity, HSBC might have intervened sooner than I've suggested above. But the evidence supports that Mr Z2 was dishonest and most likely would have provided a plausible explanation. And it's not until the point set out above that there were so many factors which together mean I think HSBC ought to have had strong / serious concerns and to have taken the actions I've set out. Prior to that point I don't think it's reasonable to expect HSBC to have challenged what Mr Z2 most likely would have told them and or to seek further evidence.

Overall, I think the loss Mrs Z suffered after 12 March 2020 would have been prevented but for HSBC's failure to take action and intervene in the account. So I think it would be fair and reasonable for any transfers to Mr Z2 from 13 March 2020 onwards to be reimbursed to her. These total around £107,800. But within the same time period there were also credits back into Mrs Z's account which appear to come from Mr Z2. These total nearly £10,000 with £7,700 of this being sent in November 2021. So the question arises as to whether these incoming payments ought to be deducted from the amount I intend to direct HSBC to pay. I've thought about this and there is no evidence to support that these funds represent the same that were sent from Mrs Z's account on or after 13 March 2020. It's entirely possible they could have come from the money sent before that time, or that the incoming payments are unrelated to Mr Z2's misappropriation of funds. If either party has further evidence on this point, I'd be more than happy to consider anything supplied in response to my provisional decision. But I'm not currently persuaded that it would be fair and reasonable to deduct these payments from the award I intend to make, solely based on the dates on which the funds credited Mrs Z's account.

The majority of this money (that I think HSBC ought to have prevented from leaving) originated in Mrs Z's HSBC Cash ISA. As I've set out above, it would typically be moved into her current account before being transferred to Mr Z2. I can't direct HSBC to reapply the ISA wrapper to these funds – this isn't something they could do. Nor can I possibly accurately assess the financial impact of the loss of the tax efficient wrapper moving forwards over an unknown period of time. So in these circumstances, I think it would be fair and reasonable to add 8% simple interest (yearly) to the payment I intend directing HSBC to make. In circumstances like this, where it's impossible to determine the precise loss, I think this is a fair and reasonable approach to take.

I understand Mrs Z is in care and has health conditions that would prevent her understanding or having an awareness of what's gone on. As such I don't think she's suffered distress or inconvenience as a result of HSBC's actions – so I'm not intending to make a compensatory award on that basis.

I appreciate that after 12 March 2020 there were payments made from the account that didn't go directly to Mr Z2. Some of these were direct debits, (these appear to primarily be

long standing charitable donations). Others were cash withdrawals. The cash withdrawals (compared to the transfers) were for relatively modest amounts. For all these payments, I'm not persuaded it can be established that those funds were misappropriated by Mr Z2. And so I'm not intending to include them in the award I'm making.

My provisional decision

For the reasons outlined above, but subject to any further information I receive from Mr Z on Mrs Z's behalf or from HSBC UK Bank PLC, I'm intending to uphold this complaint.

I intend to direct HSBC UK Bank Plc to pay Mrs Z the sum of all the transfers made to Mr Z2 from her HSBC account from 13 March 2020 onwards. 8% simple interest (yearly) should be added. This should be calculated between the date of each payment and the date of settlement.

If HSBC deducts tax from the interest award, (upon request) they should also provide Mrs Z with a certificate showing what has been deducted and why, so this can be claimed back from HMRC if appropriate."

HSBC responded to say that to bring matters to a close they accept the recommendations in my provisional decision. Mrs Z's representatives provided a further response which I'll address below.

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.

Mr Z says that he doesn't believe my proposed outcome is fair and reasonable. He believes the intervention as described in my provisional decision should have taken place in relation to a £10,000 payment to Mr Z2 on 21 January 2020. He also points out that there were frequent high value transactions in February 2020. Mr Z says that the bullet points (as above in my provisional decision) should be equally applicable at that point.

He also states that as the second POA, he didn't query the account as he believed HSBC would be safeguarding the funds. He says HSBC never contacted him about the withdrawals made by Mr Z2.

I understand my outcome will be disappointing for Mr Z who understandably wants to do all he can to protect Mrs Z's interests, particularly in the context of her being a victim of crime. However, I have to remain objective and base my decision on what I consider to be fair and reasonable in all the circumstances. It's easier, with hindsight, to say that HSBC ought to have done more at a particular point in time. But I must think about what was known at that time, and what most likely would've happened. I can't direct HSBC to provide redress for the actions of Mr Z2, there must still be a causal link between their failures and the award I'm making. And for the reasons I've already set out above, I'm not persuaded that HSBC reasonably should have acted in a way that would have prevented further loss, prior to 13 March 2020. To summarise, of particular relevance to this is the longstanding link between Mrs Z and Mr Z2's accounts, and that he most likely would have been similarly dishonest if questioned by HSBC at an earlier time. And it isn't until March 2020, that I think it's fair and reasonable to consider that HSBC had failed by not taking the further steps as described.

So having considered all the further submissions, I'm not persuaded to deviate from the outcome explained above. I'd also like to remind Mr Z that he is under no obligation to

accept my final decision on Mrs Z's behalf. If he doesn't accept my decision, it won't be legally binding, and he is free to pursue HSBC through other avenues, such as the courts, should he decide to do so. If this is something Mr Z is considering, I'd recommend that he seeks independent legal advice.

My final decision

For the reasons outlined above, my final decision is that I uphold this complaint. HSBC UK Bank Plc must pay Mrs Z the sum of all the transfers made to Mr Z2 from her HSBC account from 13 March 2020 onwards. 8% simple interest (yearly) should be added. This should be calculated between the date of each payment and the date of settlement.

If HSBC deducts tax from the interest award, (upon request) they should also provide Mrs Z with a certificate showing what has been deducted and why, so this can be claimed back from HMRC if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs Z to accept or reject my decision before 16 August 2024.

Richard Annandale
Ombudsman