

## **The complaint**

Mr T is unhappy that HSBC UK Bank Plc (HSBC) won't refund him for money he lost to an investment that he considers was a scam.

## **What happened**

Mr T says he was introduced to an investment opportunity in a trading platform (I will refer to as S) by a close friend. Mr T's friend personally knew the owner of S and told Mr T that investors were making good profits. Mr T met the owner of S who told him about his trading techniques; actively trading various markets.

In September 2021, Mr T invested £10,000 with S; making a payment to an account in S's name. Between November 2021 and January 2022, Mr T received three returns totalling £6,286 before investing another £8,000 in February 2022. This payment went into a second bank account not in S's name. Sometime later Mr T's friend alerted Mr T to the fact that all was not well and to try and withdraw his money, but it was too late.

Mr T complained to HSBC, but HSBC said this was a genuine investment that had subsequently failed rather than a scam.

Our investigator upheld the complaint. She said on balance this was a scam and covered by the Contingent Reimbursement Model (CRM) Code and that none of the exclusions applied – so HSBC should reimburse Mr T in full.

HSBC said it wanted further information and sight of the police report and it also said there is no evidence to suggest there was an intent to defraud investors. Even so, it was satisfied that the arrangements appeared suspicious in that the contract Mr T received is not on letter headed paper and does not look professional, the emails from the scammer do not contain a footer and there are spelling mistakes on other documents. It also made it clear that it had not requested a Final Decision and considered that this should wait until the outcome of external investigations.

I issued my provisional decision on 23 October 2024. Mr T accepted my provisional decision. Whilst HSBC didn't agree – it agreed to settle the matter in line with my provisional 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.

As neither party has provided any further evidence or arguments for consideration, I see no reason to depart from the conclusions set out in my provisional decision. For completeness, I have set this out below.

It's important to highlight that with cases like this, in deciding whether there was in fact a scam, I need to weigh up the available evidence and make my decision about what I think is likely to have happened on the balance of probabilities – in other words what I think is more likely than not to have happened in the circumstances.

When considering what is fair and reasonable, I'm also 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 and the terms and conditions of the customer's account. However, where the customer made the payment as a consequence of the actions of a fraudster, it may sometimes be fair and reasonable for the bank to reimburse the customer even though they authorised the payment.

HSBC is a signatory of the Lending Standards Board's Contingent Reimbursement Model (the CRM Code). This requires firms to reimburse customers who have been the victim of certain types of scams, in all but a limited number of circumstances. But customers are only covered by the CRM Code where they have been the victim of an authorised push payment (APP) scam – as defined within the CRM Code. So if I am not persuaded that there was a scam then I will not have a basis to uphold the complaint.

*Can HSBC delay making a decision under the CRM Code?*

In its more recent submissions, HSBC has said it doesn't want a decision and requested the police report from us. I take it that it considers that the payments Mr T made are the subject of an ongoing complex investigation. It seems from its lack of responses to this service's requests; it considers it would be fair to wait for the outcome of this investigation before making a decision on whether to reimburse Mr T. I have considered this, but I am satisfied that it is not necessary for me to do this in order to reach a fair and reasonable decision about Mr T's complaint.

The CRM Code says firms should make a decision as to whether or not to reimburse a customer without undue delay but that, if a case is subject to investigation by a statutory body and the outcome might reasonably inform the firm's decision, it may wait for the outcome of the investigation before making a decision.

But this provision only applies before the firm has made its decision under the CRM Code. So, it can't seek to delay a decision it's already made. HSBC only raised this point after the case was referred to our service (and a view issued). It had already reached a decision on Mr T's claim in its final response letter to him, when it said the complaint appeared to be about a genuine investment opportunity.

So I don't think HSBC can now fairly rely on this provision.

*Is it appropriate to determine Mr T's complaint now?*

I ultimately have to decide whether it is fair and reasonable for HSBC not to have upheld Mr T's claim for reimbursement of his losses. I am aware there is an ongoing investigation, and there may be circumstances and cases where it is appropriate to wait for the outcome of external investigations. But that isn't necessarily so in every case, as it will often be possible to reach conclusions on the main issues on the basis of evidence already available. And I am conscious that any criminal proceedings that may ultimately take place have a higher standard of proof (beyond reasonable doubt) than I am required to apply (which - as explained above - is the balance of probabilities).

The Lending Standards Board has said that the CRM Code does not require proof beyond reasonable doubt that a scam has taken place before a reimbursement decision can be reached. Nor does it require a firm to prove the intent of the third party before a decision can be reached. So in order to determine Mr T's complaint I have to ask myself whether I can be satisfied, on the balance of probabilities, that the available evidence indicates that it is more likely than not that Mr T was the victim of a scam rather than a failed investment.

I've reminded myself that Parliament has given ombudsmen the job of determining complaints quickly and with minimum formality. In view of this, I think that it would not be appropriate to wait to decide Mr T's complaint unless there is a reasonable basis to suggest that the outcome of any external investigation may have a material impact on my decision over and above the evidence that is already available.

HSBC has not clearly articulated whether it considers this may be the case. It's not clear if HSBC is concerned that any investigation and subsequent court action regarding S's actions may lead to Mr T being compensated twice for the same loss, i.e. by HSBC and by the courts. I don't know how likely it is that any funds will be recovered as part of those proceedings. But I agree that, if HSBC has already paid a refund, it would not be fair or reasonable for those recovered funds to be returned to Mr T as well. HSBC can ask Mr T to undertake to transfer to it any rights he may have to recovery elsewhere, so I'm not persuaded that this is a reasonable barrier to it reimbursing him in line with the CRM Code's provisions.

For the reasons I discuss further below, I don't think it's necessary to wait until the outcome of the police investigation or potential related court case for me to reach a fair and reasonable decision.

*Has Mr T been the victim of a scam, as defined in the CRM Code?*

The relevant definition of a scam in accordance with the CRM Code is that the customer transferred funds to another person for what they believed were legitimate purposes but were in fact fraudulent.

The CRM Code also says it doesn't apply to private civil disputes, such as where a customer has paid a legitimate supplier for goods or services but has not received them, they are defective in some way, or the customer is otherwise dissatisfied with the supplier.

So, it doesn't cover a genuine investment or a genuine business that subsequently failed.

So in order to determine whether Mr T has been the victim of a scam as defined in the CRM Code I need to consider whether the purpose he intended for the payments was legitimate, whether the purposes he and S intended were broadly aligned and then, if they weren't, whether this was the result of dishonest deception on the part of S.

From what I've seen and what Mr T has told us, I'm satisfied Mr T made the payments with the intention of investing in forex trading. He thought his funds would be used by S to trade and that he would receive returns on his investment.

But I think the evidence I've seen suggests S didn't intend to act in line with the purpose for the payments it had agreed with Mr T.

In this case S instructed Mr T to make a payment to an account in S's name and for the second transaction to another account that was not in S's name. Although I can't share the details for data protection reasons, the statements for both beneficiary accounts do not suggest that legitimate investment activity was being carried out by S at the time Mr T made the relevant transactions. Whilst there is evidence S initially did carry out trades on the first account (there were not any on the second beneficiary account), it doesn't necessarily follow that it was a legitimate enterprise. S and its linked companies were not authorised by the FCA to carry out trading, so its operations clearly lacked an important element of legitimacy; it was required to be authorised to do the activity it was carrying out and it wasn't. It went so far as to lie to some potential investors (including Mr T) about it being in the process of getting FCA authorisation whilst it was 'trading' – the FCA doesn't allow businesses to carry on regulated activities without being authorised, so S wasn't being honest with potential investors.

Further concerns centre around the owner of S (who was bankrupt at the time). From the paperwork provided to consumers, he appears to have "personally guaranteed" the investments (despite forex being a high-risk investment and him never being in a financial position to do so). He also signed contracts on behalf of S despite not officially being listed as the director of the business. He appears to have acted as a 'shadow director', when he would've been disqualified as a director in his own right due to his bankruptcy. Furthermore, S was listed as an 'IT consultancy' business on Companies' House and not a financial services firm.

I've also noted that – despite HSBC arguing this was a civil matter (and wanting to wait the outcome of an investigation) – it has itself noted that there were various features that indicated that the 'investment' was in fact a scam rather than a genuine investment: the contract Mr T received is not on letter headed paper and does not look professional, the emails from the scammer do not contain a footer, and there are spelling mistakes on other documents. All in all, HSBC felt it looked suspicious.

So based on the above, along with the weight of testimony we have seen from other consumers who invested in S, I am satisfied that it is more likely S was not acting legitimately, since its intentions did not align with Mr T's intentions, and I am satisfied that S was dishonest in this regard. It follows that I'm satisfied Mr T was the victim of a scam

*Is Mr T entitled to a refund under the CRM Code?*

Under the CRM Code the starting principle is that a firm should reimburse a customer who is the victim of an APP scam, like Mr T. The circumstances where a firm may choose not to reimburse are limited and it is for the firm to establish those exceptions apply. R2(1) of the Code outlines those exceptions.

One such circumstance might be when a customer has ignored an effective warning.

A second circumstance in which a bank might decline a refund is, if it can be demonstrated that:

In all the circumstances at the time of the payment, in particular the characteristics of the customer and the complexity and sophistication of the APP scam, the customer made the payments without having 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

There are further exceptions within the CRM Code, but they do not apply in this case.

The CRM Code also outlines the standards a firm is expected to meet. And it says that when assessing whether the firm has met those standards, consideration must be given to whether compliance with those standards would have had a material effect on preventing the APP scam that took place.

Under the Code, where the business fails to meet the required standards, but the customer doesn't have a reasonable belief, the business is expected to pay 50% of the redress. I am also mindful that when Mr T made these payments, HSBC should fairly and reasonably also have had systems in place to look out for unusual transactions or other signs that might indicate that its customers were at risk of fraud (among other things). And in some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, before it processed a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

*Did HSBC meet its obligations under the CRM Code and did Mr T ignore an effective warning?*

The CRM Code says that effective warnings should be risk based and, where possible, tailored to the APP scam risk indicators and any specific APP scam types identified through the user interface with which the customer is initiating the payment instructions.

HSBC did in fact identify a risk with the payments Mr T made, as it asked him on both occasions about the intended payment purpose of the transactions and displayed a warning in response to the payment purpose Mr T chose. I appreciate Mr T does not now recall seeing these warnings, but I've seen the internal audit which shows investment warnings were displayed for each payment. So, I've gone on to consider whether those warnings were effective.

The CRM Code also outlines that as a minimum, effective warnings should be understandable, clear, impactful, timely and specific and it further defines each of these minimum criteria.

In September 2021, when Mr T made the first payment for £10,000, he selected "making an investment" as the purpose for the payment. HSBC says it displayed a warning which said:

*This could be a scam.*

*Fraudsters can offer you what appears to be a genuine opportunity with high returns. They can try and pressure you to invest your savings or transfer your current pensions to a new scheme.*

- *Take time to talk to someone you trust who is not involved with the investment.*
- *You must independently research who you're sending money to*
- *Check the company is genuine and authorised by the Financial Conduct Authority by visiting (link provided)*
- *Company names can be cloned. It's vital you contact the company on an independently verified number*

*Visit our Fraud Centre to find out more.*

*By choosing continue, you agree you've read our warning and are happy to proceed. You accept we may not be able to recover your money if it's sent to a fraudster's account.*

I don't think this warning was effective. It is too specific to pension scams. I'm not satisfied that this warning clearly explained what an investment scam might look like, what research Mr T should be doing to protect himself, or that it would have been impactful in his circumstances.

For the second transaction, in February 2022, Mr T got a slightly different warning as follows:

*Fraud Alert*

*This could be a scam*

*Warning – if someone has told you to mislead us about the reason for your payment and choose the wrong payment type, stop. This is a scam.*

*Fraudsters can offer what appear to be genuine investment opportunities and may pressure you to invest your savings or transfer your current pension to a new scheme.*

*What you need to do before making the payment*

*Do not proceed if you have been cold called, offered guaranteed returns or if you are feeling pressured*

*Check if the company is genuine and authorised by the Financial Conduct Authority (link). If they are not authorised take time to talk to an independent advisor before proceeding.*

*Check the company you are dealing with is not listed on the cloned firms page (link) on the FCA website.*

*Check that the person you have been in contact with is a genuine representative of that company.*

*For cryptocurrency investments...*

*If you're unsure take time to talk to an independent adviser.*

*Visit our Fraud Centre for further guidance on how to undertake the required checks before proceeding.*

**WARNING:**

*By choosing continue, you agree you've read our warning and are happy to proceed. You accept that we may not be able to recover your payment if it is sent to a fraudster's account. If you are unsure, please stop immediately.*

I don't think this warning is effective either. It attempts to cover off too many different investment scams and fails to bring them to life. There's a lot of text. If 'investment' had been chosen as a payment purpose in an investment scam, I think it's unlikely a consumer would have been asked to mislead the bank about the reason for the payment.

Overall, I'm not satisfied that HSBC has evidenced it provided an effective warning as defined by the CRM Code and therefore it hasn't met the standards expected of it. It also follows that it can't rely on the effective warning exception to reimbursement.

*Did Mr T have a reasonable basis for belief?*

I need to consider not just whether Mr T believed he was investing in a genuine investment scheme but whether it was reasonable for him to do so. I've thought about the steps Mr T took to reassure himself about the legitimacy of the transactions and whether it was reasonable for him to proceed with the payments.

In doing so, I've taken into account the particular characteristics of Mr T and the complexity and sophistication of the APP scam.

Mr T told us he took all reasonable steps to satisfy himself that this was a legitimate investment opportunity. He said there were a number of people working with the owner of S and it had the appearance of being a legitimate business with contracts, newsletters and monthly valuations. Mr T had received a personal recommendation from his friend who knew the owner of S well and had himself been invested for some time.

Mr T also told us he checked Companies House, met the owner of S in person and felt he had obtained satisfactory explanations of his trading techniques, which sounded credible to him. Mr T said whilst he understood those techniques himself, he explained to us they are quite complex and beyond his level of skill, hence he accepted the offer of joining the investment group.

I appreciate it seems a number of previous investors had received the returns they were told they would, and Mr T met the owner of S in person who explained how he traded.

Mr T was an authorised financial adviser at the time. I don't think this would have made him an expert in spotting investment scams, and I do accept this was a sophisticated scam. But there were a number of things going on here which I do think Mr T was better placed through his circumstances to spot, than consumers without his background.

Mr T says he was aware that S wasn't authorised by the FCA. But he says he had been informed that the new directors had been appointed with a view to applying for regulatory permissions. I am not certain if Mr T is aware, but I do think it's reasonable for someone in his position to be aware, that trading in such circumstances is not allowed by the FCA and is in fact illegal under the Financial Services and Markets Act. I think this is something Mr T reasonably ought to have been aware of and spotted through his own authorisation with the FCA. In turn I think this ought to have led to further scrutiny.

Mr T also checked Companies House, but the purported owner of S was not listed as the director – yet appeared to be acting as a 'shadow director'. The company was also set up as an IT consultancy business and not a financial services firm.

There were other anomalies here such as the statements and contract - in which the owner of S personally guaranteed to return the original value of the investment. I appreciate Mr T did not place much weight on any guaranteed returns as he was expecting investment risk with the purported investment. But the fact that such promises were being made so officially and in writing in respect of a forex investment ought to have been concerning to Mr T as an authorised individual.

Overall, and on balance, I'm not persuaded Mr T had a reasonable basis for believing the payee was the person he was expecting to pay; that the payments were for genuine goods or services; or the person with whom Mr T transacted was legitimate.

I've also thought about whether HSBC took reasonable steps to recover Mr T's funds once it was made aware he was the victim of a scam. The first payment was made in September 2021 and the last one in February 2022 and the scam was reported in July 2022. I understand that Mr T didn't know he was the victim of a scam before this, but I've seen the third-party evidence that shows his funds had already been removed by the time he reported the matter to HSBC. So I don't think HSBC could have done anything further to recover Mr T's funds.

I uphold this complaint in part. I realise my decision will be a disappointment to Mr T especially as it differs to the investigator's conclusions to uphold the complaint in full. I am sorry he has fallen victim to a scam and lost so much money. But having considered all the evidence and arguments, I've decided that HSBC can only be fairly held liable for part of his losses.

### **Putting things right**

As Mr T received three payments back from S, I think it would be fair for these payments to be deducted from the amount HSBC has to refund him.

In order to put things right for Mr T, HSBC UK Bank Plc must:

A = Refund Mr T the payments he made as a result of this scam, less the payment(s) he received back from S

B = Reduce the net amount in A by 50%

C = Pay Mr T 8% interest from the date it declined his claim to the date of settlement.

If HSBC Bank UK PLC considers that it's required by HM Revenue & Customs to deduct income tax from the interest award, it should tell Mr T how much it has taken off. It should also provide a tax deduction certificate if Mr T asks for one, so the tax can be reclaimed from HM Revenue & Customs if appropriate.



**My final decision**

My final decision is that I uphold this complaint in part, and I require HSBC Bank UK PLC to put things right for Mr T as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 6 December 2024.

Kathryn Milne  
**Ombudsman**