

The complaint

Mr W complains that HSBC UK Bank Plc trading as first direct ("First Direct") won't refund the losses he incurred as part of a scam.

What happened

The background to this complaint is well known to both parties, so I won't repeat it in detail here. But in summary, I understand it to be as follows.

In June 2022, Mr W was made aware of an investment opportunity with a company which traded in Forex through an investment introducer. This company will be further referred to as 'Company A'.

Mr W reviewed the information he received from Company A and, satisfied with what he'd seen, decided to invest. Mr W made a payment of £5,000 in July 2022.

In September 2023, Mr W contacted First Direct to make them aware that he'd been the victim of a scam as he was unable to withdraw his funds from the investment.

First Direct looked into the matter but declined to refund Mr W on the basis that this was a civil dispute and not an authorised push payment (APP). First Direct further explained they were awaiting industry guidance to confirm whether they could consider Mr W's payments under the Contingent Reimbursement Model (CRM) Code. Unhappy with this response, Mr W referred his complaint to our service via a professional representative.

An investigator looked into the matter and upheld Mr W's complaint. They felt that there was sufficient evidence to demonstrate that Mr W was the victim of a scam and he should receive a full refund of his losses under the CRM Code.

First Direct disagreed with this outcome, citing ongoing investigations by third parties as the reason why it would be premature for our service to determine that Mr W was the victim of a scam. First Direct also stated that the rates of return offered by Company A were unrealistic and meant that Mr W didn't have a reasonable basis for believing the investment was legitimate.

As the complaint couldn't be resolved by the investigator it has been passed to me for a decision.

Before issuing my decision, First Direct confirmed that they consented to our service investigating this complaint. As per DISP 2.8.2(5) in the Financial Conduct Authority Handbook, our service can investigate this complaint.

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.

All parties have provided detailed submissions to our service in relation to this complaint. In keeping with our role as an informal dispute resolution service, I will focus here on the points I find to be material to the outcome of Mr W's complaint. This is not meant to be a discourtesy to either party and I want to assure them I have considered everything they've submitted carefully.

In deciding what's fair and reasonable in all the circumstances of a complaint, I'm required to take into account relevant: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to be good industry practice at the time.

In broad terms, the starting position at law is that a bank such as First Direct is expected to process payments and withdrawals that a customer authorises it to make, in accordance with the Payment Services Regulations (in this case the 2017 regulations) and the terms and conditions of the customer's account.

First Direct are a signatory of the CRM Code which requires firms to reimburse customers who have been the victims of authorised push payment (APP) scams in all but a limited number of circumstances.

Is it appropriate to determine this complaint now?

I have considered whether it would be appropriate to delay my decision in the interests of fairness, as I understand that the police's and Financial Conduct Authority's (FCA) investigations are still ongoing.

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 on the basis of evidence already available. And it may be that the 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 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).

In order to determine Mr W's complaint, I have to ask myself whether, on the balance of probabilities, the available evidence indicates that it's more likely than not that Mr W 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 Mr W first raised his claim with First Direct in 2024 and I need to bear in mind that this service exists for the purpose of resolving complaints quickly and with minimum formality. With that in mind, I don't think delaying giving Mr W an answer for an unspecified length of time would be appropriate unless truly justified. And, as a general rule, I'd not be inclined to think it fair to the parties to a complaint to put off my decision unless, bearing in mind the evidence already available to me, a postponement is likely to help significantly when it comes to deciding the issues.

I'm aware the above processes might result in some recoveries for Company A's investors; in order to avoid the risk of double recovery, I think First Direct would be entitled to take, if it wishes, an assignment of the rights to all future distributions to Mr W under those processes in respect of this investment before paying anything I might award to them on this complaint.

For the reasons I discuss further below, I don't think it's necessary to wait for the outcome of the FCA and police investigations for me fairly to reach a decision on whether First Direct reimburse Mr W under the provisions of the CRM Code.

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

The relevant part of the CRM Code definition of an APP scam requires that the payment was made to: "another person for what they believed were legitimate purposes but which were in fact fraudulent."

The Code also explains that it does not apply to '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 order to reach my decision on this complaint, I've considered the purpose for which Mr W made, and Company A received, their payments. And, if there is a significant difference in these purposes, whether I can be satisfied that this difference was as a result of dishonest deception.

It's clear that Mr W made the payments as part of an investment. So, I've gone on to consider what purpose Company A had in mind when receiving the payments and whether that was in line with the purpose Mr W made them.

In reaching an answer on what purpose Company A had in mind, the key information I've considered is as follows:

- Company A claimed to have been regulated, or in the process of becoming regulated, with the FCA in the UK and the Commission de Surveillance du Secteur Financier in Luxembourg. These claims have been confirmed as false.
- Evidence from Company A's bank shows that they lied, at least twice, when applying for accounts; namely regarding their partnership with an FCA authorised trading exchange and that Company A, itself, was regulated.
- Approximately half the funds sent to Company A's founding individuals were potentially used for Forex trading. Conversely, Mr W was under the impression that his funds would be immediately moved to an FCA regulated trading account, but the available evidence doesn't suggest this was the case.
- Further to this, any funds which were subsequently withdrawn from the Forex platform are significantly lower than the returns paid to investors. This demonstrates that investors' funds were being used to repay other investors, rather than funding investments.
- Funds sent to Company A's business account were either forwarded to other investors or sent to a cryptocurrency exchange platform. At no point was it made clear to Mr W, or other investors, that funds would be forwarded to an unregulated trading account. Further to this, around 20% of the funds moved to the cryptocurrency exchange platform weren't forwarded to the Forex trading account.
- I've seen no evidence to suggest that Company A were ever able to generate the high rates of returns they claimed.

The above information satisfies me that the purpose for which Mr W made, and Company A received, the payments was significantly different and that this was as the result of dishonest deception.

Returning to the question of whether in fairness I should delay reaching a decision pending developments from external investigations, I have 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.

With regards to the police and FCA investigations, there is no certainty as to what, if any, prosecutions may be brought in future, nor what, if any, new light they would shed on evidence and issues I've discussed. As that's the case, and further to the information I've explained previously, the evidence available sufficiently demonstrates that Mr W was the victim of an APP scam as defined by the CRM Code.

Is Mr W entitled to reimbursement under the CRM Code?

As I'm satisfied Mr W's claim meets the CRM Code's definition of an APP scam, I've considered whether he is entitled to reimbursement of his losses under the Code. Under the CRM Code, a bank may choose not to reimburse a customer if it can establish that:

- The customer ignored effective warnings by failing to take appropriate action in response to such an effective warning.
- The customer 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.

There are other exceptions under the Code, but they do not apply to this case.

First Direct have provided evidence to show the warning Mr W was presented with during the payment process for the transaction in question. First Direct hasn't relied on this warning as a reason to decline this claim under the Code in their response to Mr W or in their submission to our service. That said, I've reviewed the warning and I'm satisfied that it doesn't meet the requirements of the Code in order to be considered effective. So, I can't fairly say Mr W ignored an effective warning or that First Direct can rely on this exception to decline to reimburse under the Code.

Further to the above, First Direct also has not sought to argue that Mr W didn't have a reasonable basis for believing the investment was legitimate in their response to the complaint or in their submission to our service. For completeness, I've also considered whether this exclusion under the Code is applicable in this case.

Mr W was referred to the investment by a trusted party he'd known for a number of years. Mr W also received detailed and professional looking literature prior to investing and attended an online seminar held by one of Company A's directors.

Taking all of this into account, I'm satisfied that Mr W had a reasonable basis for believing that Company A, and the investment, were legitimate. Because of that, I'm satisfied that First Direct can't rely on the reasonable basis for belief exception to reimbursement.

Other considerations

I've considered whether First Direct could've done any more at the time of the payments in order to prevent Mr W's loss.

There are some situations where we believe that businesses, taking into account relevant rules, codes and best practice standards, shouldn't have taken their customer's authorisation instruction at 'face value' – or should have looked at the wider circumstances surrounding the transaction before making the payment.

First Direct also has a duty to exercise reasonable skill and care, pay due regard to the interest of its customers and to follow good industry practice to keep customer's accounts safe. This includes identifying vulnerable consumers who may be particularly susceptible to scams and looking out for payments which might indicate the consumer is at risk of financial harm.

Taking these things into account, I need to decide whether First Direct acted fairly and reasonably in its dealings with Mr W. I can't see that First Direct spoke to Mr W at the time the payments were made. But, even if they had, I'm not satisfied they'd have identified Mr W was falling victim to a scam, given its sophistication. Because of this I can't say that First Direct missed an opportunity to prevent Mr W's losses prior to releasing the payments.

Overall

Overall, I'm not satisfied that First Direct can rely on an exception to reimbursement. Because of this, First Direct should refund Mr W in full for the losses he has incurred. First Direct also pay 8% simple interest on that refund, to account for Mr W's loss of use of those funds. This should be calculated from the date the investigator issued their assessment of this complaint (05 February 2025) until the date of settlement. I say this as I'm satisfied that the information disclosed in that assessment was sufficient for First Direct to conclude that Mr W had been the victim of a scam and that it wasn't necessary to wait for the outcome of any ongoing investigations.

Putting things right

To put things right HSBC UK Bank Plc trading as first direct should:

- Refund Mr W in full for the payments, less the returns received (£3,000) and;
- Pay interest on that refund at 8% simple interest from the date of the investigator's assessment until the date of settlement.

As there is an ongoing investigation by law enforcement and the FCA, it's possible Mr W may recover some further funds in the future. In order to avoid the risk of double recovery, First Direct is entitled to take, if it wishes, an assignment of the rights to all future distributions under the liquidation process in respect of this £3,000 loss before paying the award. If the bank elects to take an assignment of rights before paying compensation, it must first provide a draft of the assignment to Mr W for his consideration and agreement.

My final decision

My final decision is that I uphold this complaint and require HSBC UK Bank Plc trading as first direct to reimburse Mr W as set out above.

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

Billy Wyatt
Ombudsman