

Complaint

Mr D complains HSBC UK Bank Plc failed to protect him from falling victim to a scam. He wants HSBC to refund him a payment he made out of his account.

Background

Mr D fell victim to scam. He wanted to purchase a car for his daughter. Here is what he says happened:

- He saw an advert for a car on a well-known online market place.
- Mr D contacted the seller to ask how he could arrange an inspection and whether a deposit was needed. The seller responded and said no deposit was necessary.

But the seller explained they lived in another country within the United Kingdom, and the car was stored elsewhere in the UK. To inspect the car, Mr D needed to pay the full purchase price to the storage company. The storage company would be an impartial intermediary who would deliver the car to his address for free, after which he would have five days to inspect it. If he wasn't happy, the company would refund his payment, but if he was happy, the company would forward the payment to the seller.

- Mr D undertook an HPI check which confirmed the car existed and wasn't reported as stolen. He also looked at the storage company's website (which no longer exists) and rang them. He thought the company was genuine.
- Mr D took out a loan with a third-party provider to pay for most of the car's purchase price. The loan credited Mr D's account the day he made payment to the storage company.
- Mr D expected the car to be delivered on a Friday, but it never arrived. He contacted the storage company, who said there had been a problem in transit, but the car would arrive the following Monday. During this time, Mr D spoke to a friend. The friend thought Mr D had been scammed. Mr D tried to verify the storage company actually existed, other than its website, but couldn't find a reliable source to show it did.
- Mr D became concerned he'd fallen victim to a scam, so rang HSBC to see what it could do to try and retrieve his payment.

HSBC contacted the payee's bank, but the payee's bank said the funds had been spent. Mr D complained to HSBC. He thought it could've done more to protect him when he asked it to make the payment. HSBC disagreed. It said it wouldn't have known Mr D was being scammed at the time; and it had done what it could to try and retrieve the payment. Mr D brought his complaint to our service.

An investigator decided to uphold the complaint. They found HSBC ought to have recognised the payment was unusual for Mr D and should have contacted him before it was processed. Had HSBC contacted Mr D and asked sufficient questions about the payment, Mr D would've realised he was falling victim to a scam and he would not have gone ahead

with the payment. HSBC should refund the payment, plus interest, and any overdraft charges he incurred as a result of the payment.

HSBC disagreed. It said the payment wasn't by itself unusual. Contacting Mr D in these circumstances was unreasonable and would have interfered with HSBC's general responsibility to act on a customer's mandate. And had HSBC contacted Mr D, he would've still gone ahead with the payment because he thought the storage company was genuine. Mr D ought to have researched the company before deciding to make payment. HSBC shouldn't have to make up for the loss he experienced when culpability ultimately rested with the scammer.

HSBC asked for a final decision from an ombudsman, so the complaint was passed to me to decide.

My findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I've decided to uphold Mr D's complaint.

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

In broad terms, the starting position at law is that a bank 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. That was the case in July 2018, and remains so now, and I have taken that into account when deciding what is fair and reasonable in this case.

But that is not the end of the story. Taking account of the law, regulatory rules and guidance, relevant codes of practice and good industry practice at the time, I consider HSBC should fairly and reasonably:

- Have been monitoring accounts and any payments made or received to counter various risks, including anti-money laundering, countering the financing of terrorism, and preventing fraud and scams.
- 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). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer.
- In some circumstances, irrespective of the payment channel used, have taken additional steps, or make additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.
- For branch transactions, those steps may include following the Banking Protocol where appropriate.

I am aware that HSBC considers too high a standard has been applied to what is expected of it in terms of identifying payments that might indicate a consumer is at risk of financial harm; and it has referred to 'the Quincecare duty' in support of its argument. I am mindful that the courts have interpreted Quincecare narrowly and the circumstances of this complaint are different to that case. Our 'fair and reasonable' remit also enables us to take account of regulatory and industry standards beyond the narrow legal duties considered in that and other court cases.

In any event, I am not suggesting Quincecare applies to this case. However, the broad legal position that a bank is expected to process payments that a customer authorises is not absolute – and Quincecare (along with regulators' rules and guidance, relevant codes of practice and good industry practice at the time) is an example of that.

I am mindful that my fellow ombudsman and I have referenced the relevant rules, codes of practice and good industry practice at the time in many previous decisions, both to HSBC and published on our website.

I'm satisfied HSBC ought to have picked up on the payment as unusual for Mr D. He hadn't paid a sum this size for at least six months prior to the payment. His expenditure is generally modest, and his largest outgoing is his monthly mortgage payment, which is less than £1000.

HSBC says a payment of the size Mr D made shouldn't be considered unusual. It says many customers need to make large payments they haven't made before. And questioning a customer every time they want to make a sizeable payment is an unreasonable expectation.

I'm satisfied for some customers, a payment of this size might not be unusual, even if they haven't quite paid an equivalent sized payment before. But I don't find this was the situation with Mr D. He hadn't made any payments which came close to the size of the payment he asked HSBC to make. So, HSBC ought to have considered the payment unusual and have contacted him before deciding whether to process the payment.

Had HSBC contacted Mr D, it ought to have asked Mr D questions surrounding:

- What the payment was for?
- Where and how was the car advertised?
- Why wasn't the payment being made via the online market place?
- Was the payee the owner of the car?
- What had Mr D done to ensure he wasn't falling victim to a scam?

I don't find questions of this type are unreasonable. They wouldn't have taken long to ask, and they represent reasonable measures HSBC should've taken to protect Mr D from potentially falling victim to a scam or financial harm.

Unlike Mr D, HSBC are well placed to understand scams, and the methods scammers use to trick customers into making payments. Had HSBC asked Mr D questions of the type above, it's likely it would have been concerned. It would have discovered the payment carried the hallmarks of a scam. HSBC would have realised:

- the payment was to a third party and not the owner of the car
- the payment was being made outside of the online market place the car was advertised on

- the payment was up front, and its customer hadn't had the chance to inspect the car.

Had HSBC contacted Mr D, it ought to have at least warned him the payment sounded like a scam. And it ought to have at least asked him to verify the company existed, outside of the company's website, before proceeding.

Mr D talked to a friend after he had made the payment. They advised him the payment sounded like a scam. Mr D discovered there was no information online to verify the company existed, and he realised he had likely been scammed. I'm satisfied he would have realised this sooner had HSBC got in touch; so, he wouldn't have gone ahead with the payment.

HSBC says Mr D should have done his own research before agreeing to the payment. But I understand why Mr D thought the sale was for a genuine car and he was dealing with a genuine owner and third party. I say this because:

- The emails Mr D received from the supposed storage company looked like they came from a legitimate business versed in acting as an intermediary for car sales. They were worded professionally and referred to a guarantee program should anything go wrong.
- Mr D rang the company several times prior to making the payment, and the nature of the conversations he had didn't give him cause for concern.
- Mr D had run an HPI check on the vehicle, which didn't flag concerns. One of the seller's emails referred to the vehicle being HPI checked. But unlike HSBC, I wouldn't expect Mr D to have known scammers often use the details of genuine vehicles, which means HPI checks wouldn't show up concerns.

HSBC says Mr D would've still been under the spell of the scam even if it had contacted him. But the evidence in Mr D's case doesn't demonstrate this would have been the most likely outcome. As I said before, the veil of the scam would most likely have lifted had Mr D been told the transaction sounded like a scam, and if he'd been asked to verify the storage company existed, outside of the direct contact he'd had with it.

HSBC say the payment fell outside the online marketplace's recommendation to use one of its 'eligible' payment methods. But I can't see a scam warning appears as standard on adverts on the marketplace.

Mr D says he didn't use an eligible payment channel because the marketplace's buyer protection scheme doesn't cover vehicle purchases. He is correct that he wouldn't have been protected. The storage company offered a guarantee to refund his payment if he was unhappy with the car. So, I understand why Mr D used the payment method he did. I don't find he was negligent in these circumstances.

The investigator recommended HSBC refund Mr D the payment and add eight percent simple interest per annum on to that amount from the date of the payment to the date Mr D is refunded. But HSBC says a level of interest beyond two percent per annum is unfair and punitive.

HSBC ought to be well aware our service has for some time applied eight percent simple interest on money awards where appropriate. It reflects the current statutory interest awarded by the courts on judgement debts. But this isn't to say we don't sometimes make a

different award of interest to reflect the specific circumstances of a complaint. But I don't find any specific circumstances apply to Mr D's complaint which would make the award of eight percent simple interest per annum unfair.

Putting things right

HSBC needs to:

- Refund the payment in full to Mr D.
- Refund any interest or charges Mr D incurred as a result of going into his overdraft because of the payment.
- Pay eight percent simple interest on the payment sum, from the time the payment was made, up until the date of settlement. If HSBC is legally required to deduct tax from the interest, it should send Mr D a tax deduction certificate so he can claim it back from HMRC if appropriate.
- Make payment to Mr D within a reasonable time, and no later than 28 days from the date of settlement.

My final decision

I've decided to uphold Mr D's complaint and I direct HSBC UK Bank Plc to pay redress according to the instructions I've given above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 27 April 2021.

Liam King
Ombudsman