

The complaint

Mr G complains that HSBC UK Bank Plc will not refund all of the money he lost after falling victim to a scam.

What happened

On 7 November 2019, Mr G received an unexpected phone call whilst he was driving to work. Mr G works in a highly specialised field. He told me that he's lived abroad in the past and that English isn't his native language. Mr G remembers the call began with an official sounding automated message about a problem with his tax and options to select from to immediately speak to an advisor. He suggests the message said a warrant for his arrest would be granted if he did not connect to an advisor. Mr G says he panicked. Mr G has explained it would be a problem in his line of work if adverse information such as owing a debt or being in trouble with the Police was recorded about him on official records. He thought he was speaking to HMRC, but it was really scammers impersonating the tax, payments and customs authority.

Mr G says the scammers knew enough information about him to take him through security questions, but he can't remember exactly what he was asked or what the scammers knew about him. Mr G recalls clearly that the scammers knew he had a six-month payment arrangement set up to pay his tax and that he paid it monthly. Mr G says he was convinced he was talking to a genuine HMRC employee because it sounded so real and because they knew about his tax repayment arrangements. Mr G explained that the payment plan had only been set up around two months before, so he thought it was possible that his accountant could have made a mistake which resulted in him owing HMRC more money. He recalls the number on his phone looked like a genuine HMRC phone number that he'd called when setting up the payment plan and that the call sounded like it was coming from a call centre.

The scammers told Mr G there had been an error in his last four annual tax payments and that he needed to bring things up to date immediately because he was responsible for repaying the outstanding amounts due. The scammers told Mr G the matter could progress to a court hearing and possible custodial sentence if he did not comply. Mr G explains that he was never late with payments to HMRC and always paid his tax liabilities before taking any money for himself. Mr G says the scammers told him that this was the last opportunity to make the payments without consequences and that HMRC had sent him warnings that he'd not replied to. Mr G says he agreed to make the payments without checking with his accountant because he was concerned that his job would be in jeopardy if he did not pay immediately.

The scammers told him he was being connected to another department. Mr G says the scammers told him he needed to make four separate payments, one for each of the incorrect years. He says he wanted to pay using his business debit card, but the scammers told him they could only accept immediate payment by bank transfer.

Mr G made four faster payments of just under £500 each using his mobile banking app. All the payments were sent to the same account. Mr G adds that he didn't see any warnings about scams from the bank and didn't need to enter any security codes as he made the

payments.

The scammers told Mr G they would close the outstanding balance immediately if he sent screenshots of his online banking confirming the payments had been made. The scammers sent Mr G a message on an internet messaging app for him to send the screenshots to. Mr G says the message came through with HMRC at the top. He no longer has the message but Mr G recalls that he'd received a message on the same app with HMRC at the top around ten days before the scam happened, but he'd deleted it because it wasn't relevant to him. He explains that he had the impression that HMRC could contact people in this way because his work has a messaging system that uses the same platform, so it seemed natural to him that other organisations would use it in a similar way.

Shortly after the call ended, Mr G arrived at work and told his colleagues what had happened. They told him it sounded like a scam. He contacted HSBC around an hour after the first transfer had been made but it was ultimately unable to recover any funds from the bank the money was sent to.

HSBC considered whether it ought to reimburse Mr G for his loss. HSBC is a signatory to the Contingent Reimbursement Model Code ('CRM' or 'the Code') and so considered its obligations under it.

On 19 November 2019, HSBC wrote to Mr G. It said it should have done more to protect and advise him before he made the payments. But it felt Mr G could have taken more responsibility and made checks before making the payments too. So it thought they should share the responsibility and offered to reimburse half of the money Mr G had lost. It refunded £995.40 into Mr G's account.

Mr G complained. He thought HSBC should have refunded all of the money he'd lost. HSBC disagreed and issued its final response on 15 January 2020. It said it had made the payments in line with Mr G's instructions and had been unable to recover the funds sent. It accepted partial responsibility under the guidelines set out in the Code but felt Mr G should have done more to check it was a genuine HMRC call. It suggested he should have called HMRC on the number displayed on its website or on a letter received from them, or asked to pay by card, which would have provided him with additional protection.

Mr G was unhappy with HSBC's response and asked us to review the bank's position. Our investigator upheld the complaint. She thought HSBC should have fully reimbursed Mr G. She noted that HSBC had refunded Mr G with 50% of the funds lost because it hadn't provided any warnings before he made the payments. She felt he had a reasonable basis for believing he was following legitimate instructions when making the payments. She didn't think he'd been grossly negligent.

She thought the scammer had given Mr G explanations for why he needed to make the payments that sounded legitimate. She noted that Mr G recalled the call sounding like it was coming from a call centre and pointed out the scammers knew personal details about him that were correct, which further made it seem to him that he really was speaking with HMRC. She was mindful of the pressure this type of call can put a person under. She didn't think it was unreasonable for Mr G to not have taken any further steps to validate who the caller was before making the payments.

HSBC disagreed. It said there were a number of "*highly concerning*" factors which should have alerted Mr G to the fact that this was a scam.

It pointed out Mr G received a cold call and basic due diligence and internet research by Mr G would have uncovered this. It felt this type of tax scam is extremely well known, which

is why Mr G's work colleagues immediately knew he'd fallen victim to a scam. It said the arrest warrant was an "*unrealistic threat*." It thought it was "*inconceivable*" that a professional person such as Mr G could miss red flags and pointed out Mr G told the bank that the scammer had said not to contact his accountant. It thought the requirement to pay by bank transfer was "*highly suspicious*". It thought the information the scammer said it knew about Mr G, such as the fact he had a payment plan and paid monthly instalments was generic information and not actually specific to him. It thought the explanation the scammer gave Mr G about why he needed to make four separate payments was "*absurd*".

It didn't think it was reasonable for Mr G to believe he was really speaking to HMRC. It described Mr G as a "*sophisticated, professional individual*." It said Mr G had not met the requisite level of care under the Code, so he should bear some responsibility for his loss. It also suggested that the facts might separately justify a finding of gross negligence. It considered its offer to reimburse half of the payments complied with the Code and was fair and reasonable in all the circumstances of this complaint.

In summary, it wanted it to be noted that:

- This was a basic scam and it wasn't reasonable for Mr G to believe it was genuine. He failed to carry out "*even rudimentary checks*" which he should have done, even though in this case it felt there were obvious signs this was a scam
- The investigator did not take account of Mr G's characteristics when assessing whether it was reasonable for him to believe the scam
- The circumstances described had all the hallmarks of a scam, such as the cold call, its intimidatory nature and the unrealistic threat. Grouped together, it is difficult to accept that Mr G was not grossly negligent
- Mr G has not explained why he believed the phone number to look like HMRC's number
- Mr G has not specifically confirmed what the automated message said, what options he was given or what option he chose
- It is unclear what the extent of the security questions the scammer asked Mr G were
- There is a general lack of background information regarding the arrangements Mr G genuinely had with HMRC
- Mr G is a "*sophisticated, intelligent individual involved in business*." He would have known that a request from HMRC in respect of tax liabilities would be made in writing

After considering all the evidence, I issued a provisional decision on this complaint on 4 November 2020. I provide a copy of my findings from that decision below:

"What I've provisionally 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.

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 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 consumer 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 consumer even though they authorised the payment.

Of particular relevance to the question of what is fair and reasonable in this case is the Lending Standards Board's voluntary Contingent Reimbursement Model (the CRM Code), which HSBC has signed up to.

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 G. The circumstances where a firm may choose not to reimburse are limited and it is for them to establish that a customer failed to meet their requisite level of care, as set out in the Code. It says:

A Firm may choose not to reimburse a Customer if it can establish any of the following matters in (a) to (e). The assessment of whether these matters can be established should involve consideration of whether they would have had a material effect on preventing the APP scam that took place.

(a) The Customer ignored Effective Warnings, given by a Firm in compliance with SF1(2), by failing to take appropriate action in response to such an Effective Warning given in any of the following:

- (i) when setting up a new payee;*
- (ii) when amending an existing payee, and/ or*
- (iii) immediately before making the payment*

(c) 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 payment without a reasonable basis for believing that:

- (i) the payee was the person the Customer was expecting to pay;*
- (ii) the payment was for genuine goods or services; and/or*
- (iii) the person or business with whom they transacted was legitimate.*

(e) The Customer has been grossly negligent. For the avoidance of doubt the provisions of R2(1)(a)-(d) should not be taken to define gross negligence in this context

Subsections (b) and (d) have not been included as they are not relevant to this complaint.

When assessing whether it can establish these things, the firm must consider whether they would have had a 'material effect on preventing the APP scam.' The Code itself doesn't set out specific examples of a customer failing to meet their requisite level of care. It's for businesses to consider each case on its own facts.

I have thought about how the CRM Code applies in the circumstances of the payments Mr G made and, in particular, whether HSBC ought to reimburse him under the provisions of the Code.

HSBC has already accepted that it did not provide Mr G with an effective warning before he made each payment. As such, I do not need to consider this point any further in this case.

So I've gone on to consider whether HSBC has been able to establish that it may choose not to reimburse Mr G for any other reasons given in the Code. Although I've considered HSBC's comments carefully, I don't think it has. I'll explain why.

Did Mr G make the payment without a reasonable basis for believing that the payee was the person he was expecting to pay, the payment was for genuine goods or service, and/or the business with who they were transacting with was legitimate?

I have outlined HSBC's representations around this point in length earlier in this provisional decision. It doesn't consider Mr G had a reasonable basis for believing he was genuinely speaking to HMRC. It points out that what happened to Mr G had all the hallmarks of a well-known scam that he could have thwarted with due diligence and internet research. But I think this is too high of an expectation in the circumstances of this complaint.

Importantly, Mr G has told us that it didn't even occur to him that this might be a scam. He has explained why he thought the phone number the scammers contacted him from felt familiar to him and I consider what he's said about the number appearing familiar to be a plausible explanation for why he wasn't concerned. The phone number appearing in the format Mr G describes gives credence to the situation he found himself in. When the scammers knew information about Mr G's tax arrangements, he says he was "100% sure after they told me they knew about my monthly payments that they are real."

HSBC has pointed out that Mr G is a professional person and that his actions are inconceivable for a professional person acting reasonably. The Code says that HSBC should think about the all of the circumstances at the time of the payment, in particular the characteristics of the customer and the complexity and sophistication of the scam.

I accept the bank's point that Mr G is a professionally qualified person. But from what I know of Mr G's work, it's clear that his expertise is not in relation to taxation matters. He's explained that his accountant took the lead with his tax affairs and I don't consider that to be an unusual arrangement. Mr G has told me that he is the director of his own limited company, but he has an accountant who keeps his books, calculates his tax and submits his self-assessment forms on his behalf. He's also explained he was concerned that not paying would have a detrimental impact on his employment. The scammers told Mr G that he needed to make four separate payments, one for each tax year. The bank has suggested the need to make separate payments to HMRC was absurd. But Mr G isn't an expert in the UK tax system and I'm mindful that English is not Mr G's native language either. The reasoning the scammer gave for the need to make four separate payments made sense in the context of the dialogue as it unfolded.

I have thought carefully about what Mr G recalled about interacting with the scammers on an internet messaging app and whether that should have indicated that he wasn't really dealing with the genuine HMRC. But the explanation Mr G gave to explain why this didn't raise a red flag at the time is plausible. More and more organisations are interacting digitally and as it's something that he's familiar with from his own line of work, I can see why he'd assume that other companies would communicate in the same way.

HSBC is concerned that Mr G can't remember specifically what the automated message said, what he pressed, or what the scammers asked him as security questions. But a sense of urgency, panic and the need to act quickly was created by the scammers, making Mr G more vulnerable to the scam as it unfolded. Against this backdrop, it's not surprising that Mr G can't recall the precise details of what was asked. This is a scam that hooks its victims in the moment. It creates a short-term time pressure and a fear, exploiting the trust that customers feel in the legitimate organisation and its authority.

Although HSBC considers that Mr G didn't make sufficient checks before making the payments, I think there is a balance to be struck. The Code requires HSBC to think about all the circumstances at the time of the payments, including the characteristics of the customer along with the sophistication and complexity of the scam. In doing so, I consider HSBC should bear in mind the nature and scale of the scam, as well as its customer's capability to weigh up the situation they are in at that time and make an informed decision about whether to proceed with making payments.

From Mr G's recollections, the scammers were professional and had replicated a call centre environment. What Mr G has recalled the scammers as saying felt particularly applicable to him in the moment. Looking at everything in the round, the scammer's entire operation convinced Mr G he was speaking with the genuine organisation and that he really did owe this liability. There is enough evidence to persuade me Mr G had a reasonable basis for believing he was genuinely speaking to HMRC. He was convinced that not complying with the scammer's requests could have adverse consequences for his employment. Mr G expressed disbelief when he discovered it had been a scam. He says "the truth is that they sounded so real and genuine that I made the payments and send them screenshots of the payment pages of my phone. I was not only convinced but also in a panic to make the payment so I don't get into trouble with HMRC. So I became the victim."

HSBC needs to be realistic in its expectations of what constitutes 'reasonable' when understanding the level of checks, diligence and any element of social engineering which has occurred given the circumstances of the scam and the customer. I am currently minded to think HSBC's expectations of Mr G are too high in the circumstances of this complaint.

Was Mr G grossly negligent?

HSBC says that gross negligence would be a very significant degree of carelessness. It feels that this is an objective consideration, but goes on to say that the fact Mr G is a sophisticated, professional individual cannot be ignored. It suggests that individuals acting reasonably would have terminated the phone call, or made separate enquiries to check it was legitimate before making the payments. It considers that Mr G has clearly behaved in a grossly negligent manner by not doing so and suggest the facts in this case might separately justify a finding of gross negligence. But I am not persuaded that Mr G's actions in this particular case meets that very high bar.

I don't think Mr G's actions show a lack of care that goes significantly beyond what a reasonable person would have done in the same situation. HSBC has suggested Mr G ought to have terminated the phone call or made further enquiries to ensure the payments were legitimate. But for the reasons I've already explained earlier in this provisional decision, I'm satisfied Mr G genuinely believed he was talking to HMRC and I'm not persuaded that the actions he didn't take would amount to gross negligence.

I don't think it would be fair or reasonable to say that Mr G should be held to a higher standard than that envisaged by the Code by virtue of the fact that he holds professional qualifications entirely unrelated to the nature of the scam.

Overall

Overall I'm currently persuaded that Mr G did meet his requisite level of care and I don't believe HSBC has established it was able to choose not to refund him under the Code. In the circumstances I think HSBC ought to have fully refunded Mr G at the time he reported the loss and so it should fairly and reasonably refund the remainder of that loss now."

So subject to any further representations from Mr G or HSBC, I was minded to uphold the complaint.

Mr G accepted my provisional decision. HSBC disagreed. It still felt Mr G should bear at least some of the responsibility for the loss he has suffered.

- It said the facts to support a finding that Mr G did not have a reasonable basis for belief or that he'd acted with gross negligence would be the same, so it would focus on the reasonable basis for belief as it is a lower threshold to meet.
- It said there was no specific information about Mr G's genuine tax arrangements or why the telephone number felt familiar to him.
- It said it was unclear what the telephone number looking like a genuine HMRC phone number that Mr G had called in the past meant. It did not think Mr G could have taken any comfort from the format of the numbers. The bank suggested I'd placed undue weight on this whilst ignoring and not engaging with red flags, such as the scammers telling Mr G he could not discuss his tax liability with his accountant.
- It didn't think Mr G could have held a reasonable belief that it was a genuine phone call. It said he'd accepted everything he was told by the scammers at face value, despite being certain that he'd never been late with his payments and always paid his tax liabilities.
- It said the provisional decision cited vague recollections and referred expressly to the mention of an internet messaging app. It suggested this had not previously featured in Mr G's account of events. It felt I had uncritically accepted Mr G's version of events and was "*struggling significantly*" to agree that Mr G's belief that communications he received though the app were genuinely from HMRC was reasonable.
- The bank asked me to clarify the relevance of English not being Mr G's first language to this case. It said there was no suggestion that he did not understand what was said to him during the scam call.
- It did not think a person would need expertise in relation to taxation matters to identify that the scam call was suspect. It suggested that someone in Mr G's position who was acting reasonably would have taken steps to verify the legitimacy of the call.
- In my provisional decision, I pointed out Mr G had told us that it didn't even occur to him that this might be a scam. I also said that I was satisfied Mr G genuinely believed he was talking to HMRC. HSBC suggested this demonstrated I had not properly defined the reasonable standard for customer conduct and the approach I had taken was incorrect. It said that if a genuine belief is all that is required, a customer would never bear any liability under the CRM Code in circumstances where there has not

been an effective warning as any customer that falls victim to a scam will have done so genuinely believing it was legitimate.

- It acknowledged what I had said about the pressure of the situation but did not think it was reasonable for Mr G, who knew he was up to date with his tax affairs, to believe that a public organisation such as HMRC would make such threatening calls and request payment in such an unconventional manner.
- It suggested a reasonable person, particularly a reasonable professional person, when receiving unsolicited and unexpected telephone calls demanding money, should be generally circumspect about the possibilities of scams. It said customers should question information given to them which simply does not add up. It said even though Mr G may have had a genuine belief he was paying HMRC, there were clear 'red flags' and he did not have a reasonable basis for that belief in all the circumstances.
- It listed the 'red flags' it felt should have been picked up on at the time. It said it was not reasonable for Mr G to think issues dating back over four years could have been the result of a mistake in a payment plan set up just two months earlier. It said it was concerning that he was told matters could not be discussed with his accountant. It pointed out the scammers told Mr G he'd ignored warning letters but he hadn't received any. It suggested a refusal to accept payment by any other method other than bank transfer should have stood out, along with sending proof of the payments made as screenshots on an internet messaging app.
- It thought the application of interest at 8% was unfair given the current Bank of England base rate and suggested any interest awarded should be no greater than the underlying account's rate of interest.

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 am not persuaded to reach a different outcome to my provisional decision. I have carefully considered all of HSBC's representations about whether Mr G had a reasonable basis for believing the payments he made were genuine. But they do not persuade me that he failed to take the requisite level of care required for HSBC to choose not to fully reimburse him under the terms of the CRM Code.

HSBC has suggested that I have taken an incorrect approach in my provisional decision and based my consideration on whether Mr G genuinely believed he was talking to HMRC, overlooking whether it was reasonable in all of the circumstances for him to think that he was.

As I've previously outlined, the starting proposition under the CRM Code is that a customer will be reimbursed if they are the victim of an APP scam unless HSBC can establish that a customer made payment without a reasonable basis for belief. Victims of APP scams who have met their requisite level of care should be reimbursed.

I agree with HSBC that the question to answer here is whether Mr G had a reasonable basis for belief. In my provisional decision, I was setting out the reasons why I consider Mr G had met his requisite level of care and it is that which HSBC and I disagree on.

What HSBC has said and provided indicates it considers it should have been obvious to Mr G this was a scam. It has outlined a number of 'red flags' that it suggests should have given him cause for concern. It has suggested additional checks that it believes he could have done and further actions he should have taken at the time the payments were made. Essentially, it finds it difficult to believe that a reasonable person would not have taken those steps and actions when placed in that situation.

But the fact that these things did not happen is not sufficient to meet the reasonable basis for belief exception of the CRM Code in all the circumstances of Mr G's case.

HSBC has suggested Mr G could not take any comfort from the way the format of the numbers from the scam call appeared on his phone. But what Mr G has described, to both us and the bank, explains that the appearance of the phone number was much more powerful than this. In the notes the bank took at the time Mr G initially reported the fraud, it details that Mr G was called from an 0300 number. The phone number is given in full in the bank's records and is very similar to phone numbers that are cited on the genuine HMRC website. HSBC is aware that scammers are able to pose as trusted organisations by spoofing the genuine organisation's telephone number. This is a very sophisticated technique and means that the average customer wouldn't be able to appreciate the risk that they might not be talking to the genuine organisation. The caller's number looking as if it belongs to that genuine organisation is very powerful. I've not seen anything that makes me think Mr G ought to have been aware that a fraudster could mimic a genuine organisation's telephone number in this way.

HSBC broadly accepts that Mr G has legitimate dealings with HMRC. But it does not think what the scammers said should have resonated with him. It has expressed concern that Mr G's interactions with the scammer on a messaging app have not been mentioned previously. But when Mr G first contacted the bank shortly after the scam happened, he explained he'd been asked to send screenshots of the payments he'd made to the scammer using an internet based messaging app. From what I've seen, Mr G's recollections of what happened have been consistent, both when he first reported it to the bank and when he has discussed the matter with this service.

Mr G has said his accountant's advice has always been to speak with HMRC directly to agree specific terms to repay which suit him. Mr G's recollections of what happened during the call suggest the scammer gave plausible and compelling explanations. Mr G suggested that *"the scammer at the time said to me that because of a technical problem they had with the system they could not accept the money by debit card. To me this was nothing to raise any suspicion, nothing unusual. This was because often this happens with HMRC."*

Mr G has told us that English is not his first language. There is no suggestion that he did not understand what was being said in the scam call. In fact, he's described being convinced by the content of the call that he was going to be in trouble with official organisations if he did not follow the requested steps. But in my view, this demonstrates just how persuasive and powerful the social engineering techniques used by fraudsters can be. I'm also mindful that an appreciation of those social engineering techniques can be more difficult to spot when you are not a native speaker of a language.

This type of fraud was designed to impact Mr G's thoughts and actions in the moment. It can be difficult for consumers to think clearly, and take steps they might otherwise take, under the kind of worry and emotional pressure Mr G found himself under at the hands of a fraudster. That's not unreasonable and the CRM Code takes into account the sophistication of the scam and the characteristics of the consumer in its design. Mr G was convinced he would be arrested if he did not comply and has explained he was frightened about the implications for his employment.

Mr G recalled his experience and said *“it’s about the anxiety and the panic in the moment and yes as a doctor I know that anxiety and panic makes people not able to register information whilst under psychological pressure but that knowledge unfortunately did not protect me as I am also a human being.”*

Even after considering HSBC’s further points, I still think the bank’s expectations of what constitutes ‘reasonable’ when understanding the level of checks and diligence to expect are too high, especially when considering the degree of trust and belief that social engineering creates. As such, I’m still not satisfied HSBC has established Mr G made these payments without a reasonable basis for belief that he was paying HMRC. I remain persuaded that Mr G met his requisite level of care.

I think HSBC should now fairly and reasonably compensate Mr G by refunding him the remaining money he lost as a result of the scam.

HSBC has suggested awarding interest on this amount at the rate of 8% simple would be unfair given the current Bank of England base rate. It suggests interest at the underlying account rate would be more appropriate. But I think in this case a rate of 8% simple is appropriate to fairly reflect the cost of Mr G being deprived the use of that money. Mr G was overdrawn at the time he made the payments and current interest rates charged on overdrafts are unlikely to have reduced in line with the base rate. Mr G moved money from one of his other accounts to clear the overdrawn balance, but it’s unclear what the opportunity cost of that choice to him really was. We don’t know what Mr G would have otherwise used the funds for if the scam had not happened. I’ve not seen anything that makes me think he was saving this money- it was from his overdraft on an account he uses for his day to day bills and living costs.

My final decision

For the reasons I’ve explained, I’ve decided that Mr G ought reasonably to have been fully refunded. I therefore direct HSBC UK Bank Plc to pay him:

- The remaining 50% of the money he lost – £995.40;
- Interest at the simple rate of 8% per year on that amount (less any tax properly deductible) from the date it should have accepted Mr G’s claim under the CRM Code to the date of settlement

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr G to accept or reject my decision before 11 March 2021.

Claire Marsh
Ombudsman