DRN-4791708

Financial Ombudsman Service

Complaint

Mr A is unhappy that HSBC UK Bank Plc didn't refund him after he told it he'd fallen victim to a scam.

Background

In 2019, Mr A heard an advertisement for an investment opportunity with a company that I'll refer to as B. B was promoting a scheme under which investors provided the funds for the acquisition of new vehicles. Those vehicles would then be leased to members of the public. The proceeds would benefit the investor. B told investors that they'd receive monthly payments for 36 months. In month 37, the leased car would be returned to B's partner firm and the investor would be paid an exit fee.

B told Mr A that he could expect to earn a 12% return on his investment. Amongst the various assurances he was given by the company, he was told the investment was *"asset backed"* – in other words, his funds were associated with and secured against a specific vehicle. That meant his investment was more secure.

Mr A found the opportunity to be an attractive one and agreed to invest. He used his HSBC account to make payments to B. On 3 December 2019, Mr A made two payments of £10,000 and £4,000 respectively. On 27 February 2020, he made a further payment of £14,000. He received monthly returns of a little over £260 for each investment.

Unfortunately, things didn't go according to plan. In February 2021, the regulator, the Financial Conduct Authority (FCA), imposed significant restrictions on B's partner business. An investigation had found that the company's liabilities exceeded its assets – it was 'balance sheet insolvent'. As a consequence, the FCA considered that the firm risked not meeting one of the conditions for its authorisation.

In mid-2023, the FCA restricted B's permissions so it could no longer promote investments. B later went into administration. The administrators made a referral to the Serious Fraud Office (SFO) based on what it had found. B's directors were then subject to an investigation by the SFO which has resulted in both being charged with fraud related offences. A pre-trial hearing is expecting to take place in the next few weeks, but the substantive trial is unlikely to take place for nearly two years.

Once Mr A learned that B had gone into administration, he believed he must have been the victim of a scam. He complained to HSBC and asked that it refund his losses by considering his claim under the terms of the Lending Standards Board's Contingent Reimbursement Model Code ("CRM Code"). HSBC didn't agree to refund him. It sent its final response to Mr A's professional representative on 19 July 2023 and said:

> *[We] have now reviewed the case and have deemed the situation to be a civil dispute rather than a scam … Having reviewed matters and while I sympathise with the circumstances, it is correct that this does not meet the criteria to be considered a scam since the payments were made whilst the company was active, and prior to their liquidation, and as [Mr A] received returns on his investment."*

Mr A was unhappy with the response from HSBC. He referred his complaint to this service. Further evidence had come to light since HSBC initially responded to the complaint. The Investigator considered that evidence and was persuaded that the complaint should be upheld. In summary, he found that Mr A was the victim of a scam, rather than merely having a civil dispute with the company that had sold him the investment. He also wasn't persuaded that HSBC could rely on any of the potential exceptions to reimbursement under the CRM Code.

HSBC disagreed with the Investigator's view. It pointed out that, although the directors of B have been charged, they haven't entered pleas or been convicted. It says that the charges themselves are not evidence of guilt. It said that it didn't think it should proceed with considering Mr A's complaint until the criminal trial had concluded. It relied on paragraph R3(1)(c) in the CRM Code to justify its decision to do so.

It also pointed out that, according to the investigations carried out by the FCA and the administrator, B did genuinely acquire some vehicles. It's possible that Mr A was one of the customers whose money was invested as intended. That meant that, while B might have defrauded some investors, it doesn't automatically follow that Mr A himself was a victim of fraud.

As HSBC disagreed with the Investigator's opinion, the complaint has been passed to me to consider and come to a final decision.

Findings

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

Preliminary issues

HSBC argues it should delay consideration of this case until the trial of B's directors has concluded. If the directors are convicted, there will be greater certainty as to whether Mr A is a victim of fraud. It relies on paragraph R3(1)(c) in the CRM Code to justify its view. That section of the CRM Code says:

> *If a case is subject to investigation by a statutory body and the outcome might reasonably inform the Firm's decision, the Firm may wait for the outcome of the investigation before making a decision.*

I'm not persuaded by its argument. HSBC considered the complaint and decided to treat the claim as a civil dispute on 19 July 2023. R3(1)(c) only applies *before* the firm has made its decision under the Code. It can't seek to postpone a decision that it's already made and so I don't find that it can rely on that provision here.

Furthermore, the SFO is a statutory body that was asked to investigate allegations against B's directors. It completed its investigation in January 2024. The Lending Standards Board has stated to signatories to the Code that it is not necessary for the evidence to be sufficient to meet the burden of proof in the criminal courts before a decision on reimbursement can be made.

Overall, as the SFO has concluded its investigation, I don't find it fair and reasonable to wait for the outcome of the connected court case and so delay making a decision on whether Mr A should be reimbursed.

Scam or civil dispute?

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 2017 and the terms and conditions of the customer's account. However, that isn't the end of the story. HSBC is a signatory to the CRM Code. Where a payment was made as the result of an authorised push payment ("APP") scam, the CRM Code can provide some additional protection to customers. However, it specifically doesn't cover private civil disputes.

It's important to note that there are a number of potential reasons (other than an APP scam) for a company to fail to meet its contractual obligations. That might happen, for example, where a business has a problem with cashflow. Businesses can fail or be mismanaged so that contracts are breached. That doesn't necessarily demonstrate an intention to commit fraud (which is what is needed to show that the CRM Code should apply). Instead, for a payment to be covered, it must meet the Code's definition of an APP Scam. In this context, that would require that the purpose for which the company procured the payments was different to what Mr A believed due to dishonest deception.

The key factor is what the intentions of the company were at the time of the payments. I obviously can't know what was in the mind of the individuals selling the investment to Mr A at the time. I have to infer what those intentions most likely were from what the other available evidence shows. I also need to be able to exclude, on the balance of probabilities, the alternative possibility that this is simply a matter of the company breaching its legitimate contract for a legitimate reason. Put another way, I need to decide whether the available evidence shows it is most likely that the company set out to defraud Mr A with criminal intent. That is a high bar to meet. Nonetheless, I'm satisfied that the evidence shows that this was a scam and I'll explain why.

I understand B claimed that investor funds would be allocated to specific cars. There would be a legal charge over the specific vehicle acquired. That doesn't appear to be what happened. The FCA's supervisory notice to one of the connected companies said that, while the companies had around 1,200 investors, they had charges secured against only 69 vehicles. In other words, the overwhelming majority of the cars acquired by B weren't secured in the way Mr A was told they would be.

The FCA also checked a sample of the vehicles the companies held against the DVLA database. It found that a large proportion of these vehicles were second hand. This was inconsistent with the way B explained its operating model which relied on it securing significant discounts on new cars. It also found other inconsistencies. Some leases started before the first registration of their associated vehicles. For some, the associated vehicle doesn't appear to have existed on the DVLA database at all. The FCA also said the company valuation of their stock of vehicles wasn't at all realistic.

In addition to that, a report by the administrators of one of the connected companies found that it had entered into around 3,600 individual agreements with investors. Each agreement should've been associated with a specific vehicle. However, the company only had legal title to around 600 vehicles.

For these reasons, I'm satisfied the evidence shows that B wasn't operating in the way it had told Mr A it would. The features of the investment he believed he was making were absent. The purpose for which the company procured the payments from him was, therefore, not aligned with the purpose Mr A had for those payments.

The SFO has also said that the former company directors are accused of providing investors with false information and encouraging people to invest despite knowing their investments weren't really backed up by individual cars. In the light of that, I'm persuaded that it's more

likely than not that the discrepancy between B's purpose in procuring the payment and Mr A's in making it was the result of dishonest deception on the part of B. As a result, I'm satisfied the circumstances here meet the definition of an APP scam under the CRM code.

HSBC has argued that, perhaps Mr A was one of the lucky minority whose funds were invested in the way he expected. But it's noteworthy that the 'vehicle funding form' he signed when making his two investments didn't include any information that could identify the individual vehicle and, as far as I can see, no relevant fixed charge was registered on the profile of B's partner company on Companies House. I'm therefore satisfied that it's unlikely this was the case.

Should Mr A be reimbursed under the CRM Code?

I've gone on to consider whether HSBC was required to reimburse Mr A under the terms of the CRM Code. This Code requires firms to reimburse customers who have been the victim of authorised push payment scams, like the one I've explained I'm satisfied Mr A fell victim to, in all but a limited number of circumstances. It is for the firm to establish that one of the exceptions to reimbursement applies.

Under the CRM code, a firm may choose not to reimburse a customer if it can establish that:

- The customer ignored an effective warning in relation to the payment being made; or

- 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 [1]

HSBC hasn't argued that Mr A ignored an effective warning when making either of these payments. I've also not seen any evidence that one was displayed at the time and so I'm satisfied that it can't rely on the first exception above.

I've also considered whether Mr A made these payments with a reasonable basis of belief. From what I've seen, the communication he had with B and the documents he received about the investment all appeared professional and legitimate. That is reflected in the same information received by other victims of this scam.

The way Mr A was told the investment would work isn't inherently problematic and he wasn't promised returns that were objectively too good to be true. In addition to that, the company had been operating for several years and its partner company was authorised by the FCA. Overall, I'm not persuaded there was anything about the investment that should have caused Mr A significant concern or that HSBC has established that he made the payments without a reasonable basis for believing that the investment was legitimate.

Redress

For the reasons I've explained, I'm upholding this complaint and directing HSBC to refund the payments Mr A made in connection with the scam, less the returns that he received.

Typically, I'd also award 8% simple interest on that refund calculated to run from the date the claim was declined under the CRM Code. That wouldn't be fair and reasonable here. HSBC reached its decision on the claim several months prior to the SFO concluding its investigations. It couldn't have known what the outcome of those investigations was going to

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[1] There are further exceptions within the CRM Code, but these don't apply here.

be. The CRM Code allows signatories 15 days to make a decision after the outcome of an investigation is known. Any interest calculation should, therefore, start 15 days after the SFO concluded its investigation on 19 January 2024.

There is also a possibility that, as a consequence of the administration of B and the prosecution of its directors, the authorities might recover funds to which Mr A has a partial entitlement. If HSBC reimburses him in full now, there is a risk that he ends up recovering more money than he lost to the scam.

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 reasonable for those recovered funds to be returned to Mr A. However, since HSBC can ask him to undertake to transfer to it any rights he may have to recovery elsewhere, I’m not persuaded that this is a reasonable barrier to it reimbursing him in line with the Code’s provisions.

Final decision

For the reasons I’ve set out above, I uphold this complaint. If Mr A accepts my final decision, HSBC UK Bank Plc needs to:

- Refund the money he paid to B, less the returns he received.

- Add 8% simple interest per annum to that sum calculated to run from 15 days after the SFO concluded its investigation until the date any settlement is paid to Mr A.

HSBC may require Mr A to provide an undertaking to assign to it his rights to any monies he might be entitled to recover elsewhere in respect of this loss. If HSBC asks him to provide such an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking. HSBC may treat Mr A’s formal acceptance of the terms of my final decision as being sufficient for this purpose. Alternately, it would need to meet any costs in drawing up an undertaking of this type.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr A to accept or reject my decision before 10 September 2024.

James Kimmitt
Ombudsman