

## **The complaint**

Mr and Mrs P complain that Nationwide Building Society won't refund money they lost when they were victims of a scam.

Mr and Mrs P are represented by a firm that I'll refer to as 'E'.

## **What happened**

The background to this complaint is well known to both parties and so I'll only refer to some key events here.

On 31 March 2018 Mr and Mrs P transferred £20,000, by way of two £10,000 payments, to a firm I'll refer to as 'W' to invest in a five-year bond. Mr and Mrs P received an £800 return from the investment in January 2019. W subsequently went into liquidation.

E complained to Nationwide, on Mr and Mrs P's behalf, in November 2022 saying this payment was made as part of an investment scam. And, as they considered Nationwide failed in their duty of care to protect Mr and Mrs P from it, they thought Nationwide should refund Mr and Mrs P the investment sum they'd lost plus 8% interest.

Nationwide didn't uphold the complaint and, in short, they said:

- They didn't think they did anything wrong and considered the matter to be a civil dispute, rather than a scam. This was because the payments were made to a genuine company, which entered liquidation in April 2021, but were incorporated since September 2015 – and so, had been registered as a genuine business for several years prior.
- They also noted Mr and Mrs P also received an £800 payment from the investment in January 2019 – thereby suggesting it wasn't a scam but an unsuccessful investment.
- Whether or not the duty for Nationwide to delay a payment to seek further information, in circumstances where the payment was high value and significant risk factors were present, they didn't fall short of this standard given there were no significant risk factors associated with the payments.
- The payments weren't unusual for Mr and Mrs P as there'd been large transfers and credits in the account resulting in these appearing as usual activity and spend.

Our Investigator considered the complaint but he didn't think Nationwide had to do anything further. He said the payments weren't particularly unusual or suspicious in appearance to Nationwide considering Mr and Mrs P's prior account activity. So, he wouldn't have expected Nationwide to have intervened before releasing the payments.

E disagreed and so the matter has been passed to me to decide. In short, they said:

- They referred to the Quincecare duty in that a bank has a duty to exercise reasonable care and skill when executing customer instructions. And if there are reasonable grounds for believing there's an attempt to misappropriate funds, the bank shouldn't facilitate the payment. Here, the payments from Mr and Mrs P's bank account were of a significant value. As such, it should've been identified by Nation as unusual – thereby prompting the bank to intervene by contacting Mr and Mrs P.
- Nationwide had a duty to prevent harm that is reasonably foreseeable, which it was here as Mr and Mrs P could have made a loss because of authorising a large transaction to a new payee.
- The British Standards Institution (BSI) issued PAS 17271 which confirms what should be considered 'unusual activity' and, ultimately, when a bank should intervene when a payment is authorised. From this, the payments should've been flagged for two reasons:
  - The payments were of a large amount of money – and it's important to note nothing within this document states if the customer makes regular large payments then bank should not flag these payments. It confirms any large payment should be flagged.
  - The payment was made to a new payee.
- When looking at Mr and Mrs P's transactions over £5,000 in the 12 months prior to the scam, the only non-regulated payment activity took place on 31 March 2018. They don't think it is appropriate to suggest by the amount and volume of account activity, that the scam payments were usual for Mr and Mrs P. And payments being sent to registered or non-registered businesses should've also been identified and raised concerns with the bank.
- Although Nationwide couldn't provide financial advice to Mr and Mrs P, they were able to provide warnings and question the information they received. This would've led to the bank becoming aware Mr and Mrs P had been cold called by W about the investment opportunity – which isn't allowed. And that the person offering it wasn't qualified or regulated by the Financial Conduct Authority to provide such advice. Further, Nationwide would've been aware such bonds ought to have only been promoted to high-net-worth individuals or sophisticated investors, which Mr and Mrs P weren't.
- If the bank had warned Mr and Mrs P there was even a moderate risk of losing all the money, they wouldn't have proceeded with making the payments.
- Had the bank intervened, the scam would've been uncovered and protected Mr and Mrs P from becoming a victim.
- Mr and Mrs P were vulnerable at the time of the investment as they were over 65 years of age, retired early and had suffered ill-health.

### **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.

I'm sorry Mr and Mrs P have lost a significant sum of money. But while I know this isn't the outcome they're hoping for, I don't think Nationwide has acted unfairly by not refunding their loss for similar reasons to our Investigator. In doing so, I've very carefully considered all the evidence E has provided and so if I don't mention a particular point, it's not because I haven't considered it, but I've focussed instead on what I believe to be important to the outcome of this complaint.

I've thought about the CRM code which can offer a potential means of obtaining a refund following Authorised Push Payment (APP) scams. But the CRM code didn't come into effect until 28 May 2019 and doesn't apply retrospectively. This means, as Mr and Mrs P's payments were made before this, they're not covered under the CRM code. I've therefore considered whether Nationwide should reimburse Mr and Mrs P under any of their other obligations.

In broad terms, the starting position in law is that a bank is expected to process payments and withdrawals that their customer authorises them to make. It isn't disputed that Mr and Mrs P knowingly made the payments from their Nationwide account and so, I'm satisfied they authorised it. Therefore, under the Payment Services Regulations 2017 and the terms of their account, Nationwide are expected to process the payments and Mr and Mrs P are presumed liable for the loss in the first instance.

However, taking into account regulatory rules and guidance, relevant codes of practice and good industry practice, there are circumstances where it might be appropriate for Nationwide to take additional steps or make additional checks before processing a payment to help protect customers from the possibility of financial harm from fraud.

So, the starting point here is whether the instruction given by Mr and Mrs P to Nationwide was unusual in relation to their typical account activity.

When considering this, I've taken into consideration BSI PAS17271 as referred to by E. At which point however, I think it's relevant to note that it sets out examples of suspicious activity on customer accounts for banks to look for as indicators of fraud or financial abuse. It therefore isn't a definitive or exhaustive list, nor does it specify – for example - what specific amount constitutes a large withdrawal or payment. And so, given banks must strike a balance between customers being to be able to use their account and questioning transactions to confirm they're legitimate, I think it's reasonable to consider 'suspicious activity' in the context of the individuals account usage.

Having reviewed Mr and Mrs P's account statements, I've seen they made a significant number of payments of the same value shortly before the two disputed scam payments. This includes 25 payments of £10,000 on 23 March 2018 and 36 payments of £10,000 on 24 March 2018. They also made several other transactions between £5,000 and £10,000 as well as a payment of £135,000 on 29 March 2018. Because of this, I don't think the two £10,000 payments were unusual in relation to Mr and Mrs P's typical account activity. In my view, these payments were in line with normal account use and not of an unusual enough value to have appeared out of character to Nationwide.

I've also considered that these payments were made to a new payee, which is one of the examples within BSI PAS17271 of what could be considered suspicious activity. In these particular circumstances however, when considering the significant number of other genuine payments of the same value, I don't think there would've been sufficient reason for Nationwide to think Mr and Mrs P were at risk of financial harm – regardless of whether the funds were being sent to a registered or non-registered business - due it going to a new payee. Nor would I have expected Nationwide to have been aware, from the payment information alone, that they were being made in relation to non-regulated activities. I therefore don't think Nationwide would've had reason to consider the payments as suspicious, thereby prompting them to intervene before processing them.

I've noted that E has referred to Mr and Mrs P being vulnerable at the time of the payments due to their age and being retired. Nationwide however are only expected to intervene where there is a reasonable belief that their customer is at risk of financial harm from fraud. And so, while I've considered this, I don't think Mr and Mrs P's age or retired status would've given

them sufficient reason to think this – particularly, as I’ve explained, as the payments were in line with their typical account usage. I’ve also not seen anything to show Nationwide had been informed of the ill-health E has referred to their client(s) suffered from. So, taking all of this into consideration, I don’t think Nationwide ought to have done more before following the instructions Mr and Mrs P gave.

E has made reference to what would’ve happened if Nationwide had intervened and contacted Mr and Mrs P. As I’ve concluded it was reasonable for Nationwide to follow Mr and Mrs P’s instructions without carrying out any additional checks, I don’t feel it necessary to consider these points.

I’m sorry to hear Mr and Mrs P have suffered a significant financial loss as result of what happened. But it would only be fair for me to direct Nationwide to refund their loss if I thought the bank was responsible – and I’m not persuaded that this was the case. For the above reasons, I think Nationwide has acted fairly and so I’m not going to tell them to do anything further.

### **My final decision**

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr P and Mrs P to accept or reject my decision before 6 September 2023.

Daniel O'Dell  
**Ombudsman**