DRN-4661710

The complaint

Miss N complains that Sainsbury's Bank Plc ("Sainsbury's") have failed to refund money that Miss N lost as part of an investment scam.

What happened

Miss N saw a post on a social media site that mentioned an investment opportunity. Miss N registered her interest and was subsequentially contacted by someone who said they worked for a crypto trading company that I will call B. Miss N said that she purchased crypto with her Sainsbury's credit card and forwarded it on to B. Miss N made the following payments using her Sainsbury's credit card;

Transaction Number	Date	Amount
1	26 September 2022	£1,000
2	26 September 2022	£1,000
3	28 September 2022	£1,000
4	28 September 2022	£1,000
5	28 September 2022	£1,000
6	28 September 2022	£1,000

Miss N then tried to withdraw the "profits" that she had made and when she was told she had to pay further money to make a withdrawal she realised that she had been scammed.

Miss N raised a complaint with Sainsbury's as she believed that it should have stopped her from making the payments in question.

I issued a provisional decision on 29 February 2024 in which I said the following;

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

It isn't in dispute that Miss N authorised the disputed payments she made using her Sainsbury's credit card to the crypto exchanges (where her funds were subsequently transferred on to the scammers from her crypto wallet). The payments were requested by her using her legitimate security credentials provided by Sainsbury's, and the starting position is that banks ought to follow the instructions given by their customers in order for legitimate payments to be made as instructed.

However, I've considered whether Sainsbury's should have done more to prevent Miss N from falling victim to the scam, as there are some situations in which a bank should reasonably have had a closer look at the circumstances surrounding a particular transaction.

Sainsbury's have referred to the Philipp v Barclays UK PLC court case, saying there is a legal precedent and expectation that they should carry out customer's payment instructions.

In that case, the Supreme Court considered the nature and extent of the contractual duties owed by banks when making payments. Among other things, it said, in summary:

The starting position is that it is an implied term of any current account contract that, where a customer has authorised and instructed a bank to make a payment, the bank must carry out the instruction promptly. It is not for the bank to concern itself with the wisdom or risk of its customer's payment decisions.

The express terms of the current account contract may modify or alter that position. For example, in Philipp, the contract permitted Barclays not to follow its consumer's instructions where it reasonably believed the payment instruction was the result of APP fraud; but the court said having the right to decline to carry out an instruction was not the same as being under a duty to do so.

Firstly I should highlight that the above relates to a current account rather than a credit card account.

But in any event, Sainsbury's January 2021 terms and conditions gave it rights (but not obligations) to:

"12.5 We may refuse to carry out an instruction from you to make a transaction:

12.5.4 - if we believe that a transaction is potentially suspicious or illegal (for example, if we

believe that a transaction is being made fraudulently); or"

Whilst the credit card terms did not oblige Sainsbury's to make fraud checks, I do not consider any of these things (including the implied basic legal duty to make payments promptly) precluded it from making fraud checks before making a payment.

And, whilst Sainsbury's was not required or obliged under the contract to make checks, I am satisfied that, taking into account the law, regulators rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I consider Sainsbury's 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 made additional checks, or provided additional warnings, before processing a payment – as in practice all banks do.

Have been mindful of – among other things – common scam scenarios, the evolving fraud landscape (including for example the use of multi-stage fraud by scammers) and the different risks these can present to consumers, when deciding whether to intervene

In this instance, my understanding is that Miss N had in the past sent funds to crypto firms. So taken this into consideration, I don't think that the size of the payments or pattern of spending was enough to be considered unusual until payment 5 was made.

I think at that point 5 payments to a new payee over course of two days all for the same amount should have prompted further queries from Sainsbury's. After all, why would Miss N make 5 separate payments for the same amount to the same payee rather than a lump sum of £6,000 or £2,000 on one day followed by £4,000 on the following day. In my view, the pattern of payments that was evident by payment 5 was unusual enough to have prompted Sainsbury's to question Miss N whether the payments were legitimate and not related to a scam.

Had Sainsbury's intervened at this point and asked appropriate questions, I have no reason to doubt that Miss N would have been open and honest about what she was doing. I think it's likely that Miss N would have said she was purchasing crypto to invest online with company who she had found on social media, and that she had been presented with evidence that she'd already made significant profit, but had not actually withdrawn anything yet.

If at this point Sainsbury's had said that this has the hallmarks of a scam and that by sending on crypto from an exchange to B she was in danger of losing her money, I think that Miss N would have done further research about B.

I note that there were no credible warnings about B at the time of the payments and I also can see that B were essentially a clone of a legitimate firm. That said, in this specific case had Sainsburys said that what she was doing with B had the hallmarks of a scam, I think that Miss N would have researched common crypto scam features and would have discovered for herself that what she was doing i.e. being requested to make a number of payments in a very short space of time, was likely a scam. I say this because of the research Miss N did into B prior to the scam (which I will touch on later), shows that Miss N was taking this "investment" seriously. So I think any warning about B likely being a scam would have been heeded by Miss N. Given this, I am satisfied, albeit on balance, she would not have made payment 5 and 6. I therefore think that Sainsbury's should refund these transactions.

I have thought about whether Miss N contributed to her own loss. From what I can see, Miss N searched companies house and the FCA number provided on B's website and also looked at online reviews. My understanding is that B was a clone of a legitimate firm with very slightly different spelling. And the online reviews available at the time were positive. Given the sums involved I think that Miss N took reasonable steps to check that the investment was legitimate before making the payments in question and that Miss N did not contribute to her own loss.

I've also thought about whether a Section 75 claim for the payments would have been successful. But I don't think that it would have. Miss N could not claim that she did not receive the goods or services paid for from her Sainsbury's account. The payments made on her credit card were to purchase cryptocurrency and Miss N received the cryptocurrencies that she'd purchased. It was only when Miss N transferred the cryptocurrency from her crypto wallet did the loss occur – but this is a separate transaction not covered by Section 75. Also for Section 75 to apply Miss N would have needed to pay B directly - which she did not - so I don't think Section 75 applies in this instance."

Both parties responded saying they had nothing to add in response to my provisional decision.

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.

In this instance as no new points have been raised, I see no reason to depart from the findings I reached in my provisional decision. In summary, I think Sainsbury's should have intervened when payment 5 was made and that this would have stopped the scam. I also think that Miss N did not contribute to her own loss as she had done appropriate due diligence.

I also did not think that Sainsbury's could have recovered the payments via other means.

Putting things right

So, I think that Sainsbury's should

- Refund payments 5 and 6,
- Pay 8% simple interest, per year, on those amounts, calculated from the date of each payment to the date of settlement (less any tax lawfully deductible).

My final decision

For the reasons given above, I uphold this complaint in part and direct Sainsbury's Bank Plc to pay the redress set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss N to accept or reject my decision before 4 April 2024.

Charlie Newton
Ombudsman