DRN-4482799

The complaint

Mr and Mrs P complain that National Westminster Bank Plc (NatWest) won't refund the money they lost when they sent a payment to an investment that they now believe to have been fraudulent.

They bring their complaint with the aid of a representative. In what follows I will mainly refer to Mr and Mrs P for clarity, even where comments or submissions were made on their behalf by that representative.

What happened

Mr and Mrs P hold an account with NatWest. In January 2019 they made a payment from that account for an investment, in the sum of £20,000.

Mr and Mrs P did so in the belief that this was being invested in a property development company. I'll refer to this company as G. The investment was essentially a fixed duration loan to G and was to provide Mr and Mrs P with a fixed rate of return. G would be required to repay the capital at maturity. This type of investment is sometimes referred to as a mini-bond.

However, a few months after investing, reports began to emerge that the interest payments on the investment weren't being received as scheduled. G claimed it had hit financial difficulties and that there would be delays. Unfortunately, the company later failed and has entered a liquidation process. That process is still ongoing.

Mr and Mrs P now believe G was not operating legitimately. They believe the investment was essentially being operated as a 'Ponzi' scheme - whereby returns were being fraudulently paid out of money received from other investors and not being paid from profits earned through property development work.

In 2023, Mr and Mrs P reported the matter to NatWest as having been an APP scam.

NatWest looked into what had happened. It didn't think this was necessarily a scam rather than a failed investment. And in any event NatWest said it wasn't liable for the losses Mr and Mrs P had incurred. It had carried out the instructions Mr and Mrs P had given it at the time - as it was obliged to. There was no reason for it not to have done so.

Mr and Mrs P didn't accept this. They argue that NatWest should have intervened, and that had it done so it would have been alerted to concerns about the proposed investment. In very brief summary, Mr and Mrs P say those concerns would have been that:

- This was not simply a failed investment in a legitimate company, it was operating as a Ponzi scheme;
- Returns of over 10% per year were exceptionally high;
- The investment wasn't a suitable one for Mr and Mrs P;
- G was an overseas investment in property, not regulated by the FCA; and,
- The investment had been promoted to Mr and Mrs P by an unregulated agent and in

an unsolicited manner.

Our investigator considered the complaint. He thought that NatWest should arguably have contacted Mr and Mrs P prior to processing their payment. But he said he didn't think such a step would have made a difference – it wouldn't have prevented the payment from being made (and the subsequent loss). He said that neither NatWest or Mr and Mrs P could reasonably have identified sufficient concerns about G being potentially fraudulent at the time the payment was made to have led to the payment being prevented.

Mr and Mrs P didn't agree that the investigator had reached the correct conclusions. Amongst other things, they have submitted an expert report to support their case.

In light of this disagreement, I have been asked to make a final decision on their complaint.

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.

Mr and Mrs P have made extensive submissions in support of this complaint. I'm very aware that I've summarised this complaint and the relevant submissions briefly, in much less detail than has been provided, and in my own words. No discourtesy is intended by this.

Instead, I've focussed on what I think is the heart of the matter here. As a consequence, if there's something I've not mentioned, it isn't because I've ignored it - I haven't. I'm satisfied I don't need to comment on every individual point or argument to be able to reach what I consider is the right outcome. Our rules allow me to do this, reflecting the informal nature of our service as a free alternative to the courts.

As such, the purpose of my decision isn't to address every single point raised. My role is to consider the evidence presented by the parties to this complaint, and reach what I think is an independent, fair and reasonable decision, based on what I find to be the facts of the case.

For the avoidance of doubt, in doing so, I have carefully reviewed everything submitted by Mr and Mrs P, including the expert report.

Mr and Mrs P have explained that this expert report was originally prepared for another of their representative's clients. The report runs to 18 pages including the appendices.

Undoubtably as the consequence of having been prepared for a client other than Mr and Mrs P, large parts of the report's content are not applicable to Mr and Mrs P's complaint (for instance, the payment in the other case was apparently made by cheque rather than by bank transfer).

However, the report does summarise some of the key considerations applicable to complaints about Authorised Push Payment fraud. In the interests of brevity, I will not repeat the content of the report here, but I have considered it fully in reaching my findings.

To expand further on what I have taken into consideration: 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.

Where the evidence is incomplete or missing, I am required to make my findings based on a balance of probabilities – in other words what I consider is most likely given the information

available to me.

As a starting point, Mr and Mrs P don't dispute that the payment was made in line with their instructions to NatWest to make the payment.

In broad terms, the starting position at law is that a bank such as NatWest 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.

And, as the Supreme Court has recently reiterated in *Philipp v Barclays Bank UK PLC*, subject to some limited exceptions banks have a contractual duty to make payments in compliance with the customer's instructions.

In short, where a bank receives an unambiguous authorised payment instruction for an account in credit, as NatWest did here, then the bank's primary obligation is to carry out that instruction without delay.

That means in the first instance Mr and Mrs P are presumed liable for the payment. NatWest would not ordinarily have any responsibility for a loss incurred through the payment - provided it carried out those instructions correctly. There is nothing that leads me to conclude it did not do so here.

However, I consider that as a matter of good industry practice at the time (and now) that a bank such as NatWest ought to have taken steps to intervene prior to processing a payment instruction where it had grounds to suspect a payment might be connected to a fraud or a scam. Any such intervention should have been in proportion to the level of risk perceived.

The question then arises whether NatWest ought reasonably to have held such suspicions or concerns in relation to Mr and Mrs P's payment — and if so, what might have been expected from a proportionate intervention.

Arguably, there was justification here for an intervention by the bank prior to processing Mr and Mrs P's payment instruction. This was a significantly larger than usual payment for their account, and one being made to a new payee.

But for me to find it fair and reasonable that NatWest should refund the payment to Mr and Mrs P, requires more than finding that the bank ought to have intervened.

A legitimate payment could equally have been for a larger than usual sum and to a new payee – these factors need not necessarily mean a payment will result in loss to fraud or scam.

I would need to find not only that the bank failed to intervene where it ought reasonably to have done so — but crucially I'd need to find that but for this failure the subsequent loss would have been avoided.

That latter element concerns causation. A proportionate intervention will not always result in the prevention of a payment. In many instances the initial concerns that prompted the intervention will appear upon enquiry to be unwarranted. And if I find it more likely than not that such a proportionate intervention by the bank wouldn't have revealed the payment was part of a fraud or scam, then I couldn't fairly hold the bank liable for not having prevented it from being made.

In thinking about this, I've considered what a proportionate intervention by NatWest at the relevant time would have constituted, and then what I think the result of such an intervention

would most likely have been.

To reiterate, the bank's primary obligation was to carry out its customers' instructions without delay. It wasn't to concern itself with the wisdom or risks of the customers' payment decision.

In particular, NatWest didn't have any specific obligation to step in when it received a payment instruction to protect its customers from potentially risky investments.

The investment in G wasn't an investment the bank was recommending or even endorsing. The bank's role here was to make the payment that Mr and Mrs P had told it to make. Mr and Mrs P had already decided on that investment.

And I find that NatWest couldn't have considered the suitability or unsuitability of a third-party investment product without itself assessing Mr and Mrs P's circumstances, investment needs and financial goals. Taking such steps to assess suitability without an explicit request from Mr and Mrs P (which there was not here) would have gone far beyond the scope of what I could reasonably expect of NatWest in any proportionate response to a correctly authorised payment instruction from its customers.

That said, I think it would have been proportionate here for the bank, as a matter of good industry practice, to have taken steps to establish more information about this payment.

What matters here is what those steps might be expected to have uncovered at the time. While there may now be significant concerns about the operation of G, and legitimacy of the investment, I must consider what NatWest could reasonably have established in the course of proportionate enquiry to Mr and Mrs P about their payment back in January 2019. I cannot apply the benefit of hindsight to this finding.

Mr and Mrs P point out that the rate of return being offered by G was high, and therefore a sign that should have prompted concern.

I agree that the rate was high. I don't doubt this was part of the attraction of the investment for Mr and Mrs P. I don't however think it was so high as to be considered too good to be true – either by Mr and Mrs P or by NatWest.

In simplistic terms, the rate of return (the yield) on a loan or mini-bond will typically vary according to the perceived risk - most usually the default risk. Riskier investments need to offer a higher yield to compensate an investor for bearing the risk that the investment might fail.

In other words, a higher than usual rate of return would be expected for a legitimate but risky investment. But that investment risk isn't at all the same thing as the risk of fraud or scam that I'd expect NatWest to have been alert for.

And with this in mind, I don't consider a rate of return such as that offered by G would necessarily show an investment was fraudulent. It might more commonly reflect a legitimate investment risk.

Neither do I consider the geographic location of the underlying company indicate that G was not legitimate. This mini-bond or loan note was issued by a company based in one the largest European economies – not something that in itself would give cause for any particular concerns. Nor was the nature of the investment (large scale redevelopment of property) inherently something likely to prompt concern.

On the face of it, I don't think this would have appeared fraudulent at the time. But I have

noted the reference made by Mr and Mrs P to another expert report, which alleges that G was a pyramid or Ponzi scheme and had been so operating for at least four years prior to 2019.

However, having carefully reviewed that material, it does not appear these allegations (or the information upon which those allegations were based) was in the public domain or otherwise readily accessible at the time Mr and Mrs P made the disputed payment. Rather, the report's conclusions appear to rest on a review G's internal correspondence - and specifically documents that were only uncovered during the liquidation process by someone with free access to G's private internal documents. As such this correspondence or documentation couldn't have been accessed by either NatWest or Mr and Mrs P at the time the disputed payment was made.

In summary, I've considered everything else submitted and the arguments made, but while there may now be concerns about the legitimacy of G's business, everything I have seen indicates that these concerns began to surface in the public domain *after* the relevant payment was made by Mr and Mrs P.

Mr and Mrs P haven't provided details about who it was that first advised them to invest in G. But they have explained that their adviser wasn't FCA regulated. Had NatWest asked who'd advised Mr and Mrs P about the investment then this information would have come to light at the time. This type of investment could be entered into without obtaining regulated financial advice and might be made available to clients of an unregulated adviser.

Mr and Mrs P refer to the regulator's guidance on UCIS (Unregulated Collective Investment Schemes). The FCA website provides a useful explanation of what a collective investment scheme is (a UCIS being an unregulated version of the same):

> *"collective investment scheme (CIS) - sometimes known as a 'pooled investment' - is a fund that usually has several people contribute to it. The fund manager of a CIS will invest investors' money into one or more types of asset, such as stocks, bonds or property."*

But the documents in this case (including the loan note agreement signed at the time) show this investment was a loan note – a debt instrument. At least purportedly, it was a loan being made directly to a property company to fund that company's activities – it wasn't an investment in a fund (and I've not seen anything which leads me to think it was).

While I think this loan note was likely to share a similar level of investment risk with that posed by UCIS investments, legally it was a different type of investment. So, I can't agree that NatWest would have readily identified it as a UCIS. As I've noted above, investment risk isn't the same thing as the risk of fraud or a scam.

And while the FCA did later impose a ban on the mass marketing of speculative mini-bonds, that ban wasn't in place in January 2019 when Mr and Mrs P made this payment (the ban was announced in November 2019 and took effect from January 2020).

So, the status of the adviser and the investment weren't something that would necessarily have indicated G was fraudulent (or that the investment was a scam) at the time Mr and Mrs P asked NatWest to make their payment.

All considered, I don't think it would've been readily apparent in January 2019 that G might be fraudulent rather than simply a higher risk investment. I simply don't think NatWest could readily have uncovered information – especially through proportionate enquiry in response to a payment - that would have led to significant doubts about the legitimacy of G at that point

in time. Neither do I think Mr and Mrs P could have uncovered such information at the time – they were not at fault here.

To recap, I can only reasonably expect any intervention or enquiries made by NatWest to have been proportionate to the perceived level of risk of G being fraudulent. I don't think that proportionate enquiry in January 2019 would have led to either NatWest or Mr and Mrs P to knowledge of G being other than legitimate. With that in mind, and all considered, I'm not persuaded that NatWest was at fault for carrying out the relevant payment instruction, or for not preventing Mr and Mrs P from making their payment.

When Mr and Mrs P later reported the matter to NatWest, there would have been no reasonable prospect of recovering their funds from the beneficiary account. The payment had been made several years earlier, and from what I understand the beneficiary account had been closed prior to the date Mr and Mrs P contacted NatWest to report the matter. Further, by that point, G had already entered the process of liquidation - with the liquidator requesting creditors to register any claims on G's assets pending their distribution. If Mr and Mrs P have yet to register with the liquidator, that is something they may wish to do.

Having carefully considered everything Mr and Mrs P and NatWest have submitted, I don't find NatWest could have reasonably prevented the losses Mr and Mrs P have incurred here.

Neither do I find the bank materially at fault otherwise. In saying this, I don't underestimate the impact on Mr and Mrs P of the loss of such a significant sum. However, it is simply the case that I don't consider I can fairly and reasonably hold NatWest liable for that loss.

My final decision

For the reasons given above, my final decision is that I do not uphold Mr and Mrs P's complaint about National Westminster Bank Plc.

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 30 May 2024.

Stephen Dickie
Ombudsman