

## The complaint

Mr M complains that Nationwide Building Society won't refund money he lost when he was a victim of a scam.

Mr M is represented by a firm I'll refer to as 'C'.

## What happened

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

I wrote to both parties saying:

*"...Mr M made the following two payments as part of an investment scam:*

<b>Date</b>	<b>Type</b>	<b>Amount</b>
1 October 2021	Visa Debit Card Payment – Economics 101 Hub	£449
10 November 2021	Faster payment – W	£8,902.38
<b>Total:</b>		£9,351.38

*Mr M became aware in late 2021 he'd been scammed when his attempts to withdraw £10,000 from the trading account weren't successful, and as the scammer told him he needed to pay a tax fee of £5,800 for the withdrawal to be processed. He contacted Nationwide about this in February 2022 but was told his funds couldn't be reimbursed.*

*C, acting on Mr M's behalf, raised a complaint in May 2022 but Nationwide's position didn't change. Nationwide said the loss occurred from Mr M's account with W, not them. And that they presented a relevant warning to Mr M on his online banking which told him what checks to undertake before proceeding, which he failed to do. Nationwide did however accept that a call between one of their agents and Mr M regarding the £8,902.38 payment could've been handled better. To recognise this, Nationwide paid Mr M £50.*

*The matter was referred to the Financial Ombudsman and our Investigator thought it should be upheld in part. He thought it was reasonable for Nationwide to have contacted Mr M at the point of the second payment. But he didn't think this intervention was sufficient and that Nationwide missed the opportunity to prevent the second scam payment. Our Investigator however thought Mr M ought to take some responsibility for his loss too – as he didn't carry out any due diligence before proceeding and there was information easily accessible online indicating [scam firm – which I'll refer to as 'I'] as a scam broker. So, he recommended Nationwide refund £4,451.19 – that being 50% of the second payment – without any additional interest*

*as the funds used to invest were borrowed from Mr M's daughter (and so were not his own).*

*C accepted the refund recommended by our Investigator. But they explained that while the funds came from Mr M's daughter, it was repaid about two weeks later and evidenced this by providing a copy of Mr M's bank statements. And so, they thought 8% interest should be awarded from the date the loan was repaid until the date of settlement.*

*Nationwide didn't agree and, in short, raised the following points:*

- *'Me-to-me' scenarios, such as this one, aren't covered under the Contingent Reimbursement Model (CRM) code as it doesn't involve a payment to another person. Whereas the payment from W to the scammer would be to another person – albeit W isn't a signatory to the CRM code.*
- *The actions/omissions of W in relation to this case should be considered under DISP 3.5.2.G. As they fail to see how the Investigator's conclusion that Nationwide had sufficient grounds to intervene in the disputed payment wouldn't apply equally, and more forcefully, to W given the funds were transferred from Mr M's W account to the scammer.*
- *Focusing solely on Nationwide's actions, and not those of W, creates a host of practical difficulties and complications for firms. In particular, it:*
  - *Produces arbitrary and inconsistent outcomes – in that other firms in the payment chain will bear no liability.*
  - *Would be unworkable for firms to replicate or anticipate at the initial complaint stage as they don't have full visibility of the payment journey before the funds being received by them, or after the funds leave their account.*
  - *It is at odds with a previous decision reached by the Financial Ombudsman on a similar case involving a me-to-me scam payment(s). Here, the Ombudsman recognised the payment between the customer's own accounts did not cause or give rise to a loss prior to the onward payment to the scammer.*
- *It appears the Investigator is seeking to apply the approach the Financial Ombudsman has adopted in me-to-me cases involving crypto payments. But there are key differences between this case and the crypto scenario – such as:*
  - *A crypto exchange will not be FCA regulated, and their conduct won't generally fall within the Financial Ombudsman Service's jurisdiction.*
  - *The standards and expectations for transaction screening, which the Financial Ombudsman applies to FCA regulated firms, will not apply to the crypto exchange receiving the funds and allowing their onward remittance. Here, the payments were to another FCA regulated firm to which those standards and expectations do apply.*
  - *The firm permitting payments to a crypto exchange has knowledge of it being a crypto transaction whereas they did not – as they had no knowledge of the onward payments from W. But presumably W would've known where the payments were being directed.*
- *There is a significant break in the chain of causation as, regardless of any perceived omission on their part, W could still have prevented Mr M's loss. W's actions post-dated Nationwide's and should be regarded as the operative cause*

*of the loss – an established principle that was recognised in the final decision referred to above.*

- *Mr M suffered no loss from making the payment between his Nationwide account to his W account. Were this a litigated case featuring the equivalent findings, Nationwide would be entitled to seek a full contribution from W. And while the Financial Ombudsman is not bound to arrive at the same outcome, under DISP 3.5.2.G the actions of other firms should at least be considered.*

### **My current thoughts**

*I've thought about the CRM code which can offer a potential means of obtaining a refund following scams like this one. But the CRM code only applies to Authorised Push Payments (APP), and those payments must be made to an account held by another person. As the first payment was made by debit card, that isn't covered. And neither is the second payment as Mr M sent it to an account he held in his own name. I've therefore considered whether Nationwide should reimburse Mr M under any of their other obligations.*

*In broad terms, the starting position in law is that a bank is expected to process payments their customer authorises them to make. Here, it isn't disputed that Mr M knowingly made the payments from his Nationwide account. I appreciate Mr M was tricked by the scammer as he thought it was a genuine investment opportunity. Nevertheless, I'm satisfied the payments were authorised by Mr M. So, under the Payment Services Regulations and the terms of his account, Nationwide are expected to process the payments and Mr M is presumed liable for the loss in the first instance.*

*I have however taken into account regulatory rules and guidance, relevant codes of practice and good industry practice. This includes, but isn't limited to:*

- *The British Standards Institute code of practice PAS 17271.*
- *FCA Principles for Businesses 2 and 6, and SYSC 3.2.6R.*
- *The FSA's (the predecessor to the FCA) thematic review paper of 2012, 'Bank's defences against investment fraud – Detecting perpetrators and protecting victims'.*

*From this, 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 instructions given by Mr M to Nationwide were unusual enough - in relation to his typical account activity – to have expected Nationwide to have identified Mr M was at risk of financial harm from fraud.*

*I wouldn't have expected Nationwide to have carried out any additional checks before processing the £449 debit card payment – as I don't think it was sufficiently unusual or out of character. Nationwide did however carry out additional checks before processing the £8,902.38 payment, as Mr M contacted them after receiving a text message asking him to get in touch. Nationwide therefore had an opportunity to identify whether Mr M was falling victim to a scam and prevent it. And so, I've considered whether Nationwide did enough to protect Mr M here.*

*In the call, the Nationwide agent asked Mr M various questions regarding the purpose of the payment. And Mr M explained the payment was going to W – to an account in his own name that he set up – and then on to an investment company, I, who he'd found online. Mr M said he hadn't received any cold calls, nor was he being messaged and asked/told to transfer money. He also confirmed that he had full access to the investment, from which it was very easy to make withdrawals, and he spoke with his investment manager regularly.*

*Although aspects of the agent's questioning were appropriate, upon asking Mr M whether he'd researched I and the investment, Mr M explained he hadn't – only that he had started with a smaller amount about six weeks ago and it had done 'pretty good'. Given Nationwide know the prevalence of investments scams, I don't think it was reasonable for the agent not to probe Mr M further about why he hadn't undertaken any due diligence before proceeding to invest – irrespective of whether the initial amount appeared to be performing well, as scammers commonly use fake trading platforms to trick their victims.*

*I also consider it would've been reasonable for the agent to have questioned Mr M as to why the funds to be invested were being sent via W, and not direct. Particularly as adding additional stages to a payment journey is also another known tactic used by scammers – and so should've been identified by Nationwide. Further appropriate questioning around Mr M's relationship with I would've also likely uncovered that they'd assisted him in setting up the investment by way of remote desktop software. These should've been red flags to Nationwide and, accordingly, it would've been reasonable for a clear warning to be given to Mr M that it was likely he was falling victim to a scam. The agent therefore ought to have advised Mr M not to proceed with the investment because of this, or at the very least, recommended he carry out research on I before investing – including searching the firm online and checking that they were authorised to undertake regulated activities by the FCA.*

*I've no reason to think Mr M wouldn't have listened to such advice had it been provided. But while the FCA hadn't yet published their warning about I at that time, as our Investigator explained, there was easily accessible information online indicating I as a scam broker. It follows that I think Mr M would've likely found this, along with confirming I weren't authorised by the FCA, and so the scam would've been uncovered. I therefore think Nationwide could've prevented Mr M's loss from the point of the second payment.*

*At which point, I'm aware Nationwide has argued that the actions of W – where the funds were sent to before forwarded to the scam – ought to be considered here as that is the point of loss, and therefore breaks the chain of causation. Nationwide has also pointed out W would've known where the funds were being sent, whereas they did not, and that by not considering W's actions it can lead to difficulties and complications for firms like themselves.*

*I'd like firstly address Nationwide's reference to DISP 3.5.2.G., which says:*

*"The Ombudsman may inform the complainant that it might be appropriate to complain against some other respondent."*

*While I understand the reasons Nationwide have put forward for the actions of W to be considered, this rule only allows an Ombudsman to inform Mr M of his right to complain against W. It doesn't infer that an Ombudsman can, or should, consider the actions of another firm (respondent) when deciding a complaint. And here Mr M has legal representation, C, who are aware of his right to complain to W about this*

matter. C have also told us that no such complaint has been made – which we've confirmed with W.

I can only look at the complaints referred to the Financial Ombudsman. And Mr M has only complained to Nationwide and referred this complaint to us. I therefore can only consider and decide whether Nationwide, and not W, is responsible for Mr M's loss. And it would be at the discretion of Nationwide to decide whether they wish to pursue any contribution, such as through the courts, from W.

I have however considered Nationwide's argument that they're not responsible for Mr M's loss as they believe there is a break in causation between it and their actions. And in support of this, Nationwide referred to another case that was decided by the Financial Ombudsman. While I've considered the decision Nationwide has referenced, I'm looking at the specific circumstances of Mr M's complaint and so I will only comment on that here. Having done so, I don't think there was a break in causation between Nationwide's actions – that being the failure to identify Mr M as falling victim to a scam and provide him with appropriate warnings/advice to protect him from it – and the loss he suffered.

This is because the purpose of the payment from Nationwide was for the funds to be invested with I, with Mr M explaining this to Nationwide – which, as I've explained, Nationwide should've questioned further. The funds were also immediately transferred, on the same day, from W to the scammer. And so, had it not been for Nationwide's failure to protect Mr M – thereby preventing the payment from going ahead and being sent to W – he ultimately wouldn't have suffered the loss. I therefore consider Nationwide is responsible for Mr M's loss in respect of the second payment.

I have however also given thought as to whether Mr M did enough to protect himself from the scam. And I don't think he did. I think it would've been reasonable to have expected Mr M to have carried out some due diligence – such as searching I online – before proceeding. Had he done so, he would've likely found the information indicated the firm was a scam as I've explained. I therefore think Mr M is equally responsible for the loss he suffered. Because of this, I think it would be fair and reasonable to make a 50% reduction in the award based on contributory negligence in the circumstances of this complaint – thereby refunding £4,451.19.

I've also considered that, as result of the scam, Mr M suffered a loss of use of funds. Our investigator didn't recommend any interest as the funds came from money Mr M borrowed from his daughter. Mr M has however since evidenced that he repaid his daughter a couple weeks later – on 23 December 2021 – by cashing in some pensions. I therefore consider Mr M did suffer a loss of use funds from this point. And so, to put things right, I think Nationwide should also apply 8% simple interest per year (calculated from 23 December 2021 to the date of settlement) to the refund.

I understand Nationwide paid Mr M £50 compensation as they accept the telephone call regarding the £8,902.38 payment could've been handled better. Having considered this, I don't intend to increase this any further.

### **Next steps**

It follows that, in considering the overall circumstances of this complaint, to put things right I think Nationwide should refund Mr M £4,451.19 – that being 50% of the second payment. They should also pay 8% simple interest from 23 December 2021 –

*the date in which Mr M repaid the funds he borrowed from his daughter – until the date of settlement.”*

C confirmed Mr M's acceptance. Nationwide however did not agree and, in short, they've added:

- They don't believe there was a loss with Nationwide, nor do they agree that only their actions should be considered when the funds were sent from W to the scammer.
- They questioned why Mr M hasn't raised a complaint with W given it was with them that the loss occurred. And there was more cause for W to have intervened given the funds were sent to them and forwarded to the scammer on the same day.
- If a complaint was raised about W, the Financial Ombudsman would be considering their liability too – possibly deciding all three parties should be held jointly liable.
- Mr M could later raise a complaint with W and be refunded further – thereby receiving double benefit.

### **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, and having thought carefully about the additional points put forward by Nationwide, I see no reason to depart from the above.

As I've explained, there are circumstances where it might be appropriate for Nationwide to carry out additional checks before processing a payment to help protect a customer from the possibility of financial harm from fraud. Here, as Nationwide spoke with Mr M before processing the £8,902.38 payment, they had an opportunity to identify whether he was falling victim to a scam and prevent it. And had Nationwide questioned Mr M appropriately about the payment, I'm satisfied they would've exposed the scam and prevented Mr M's loss from this point.

I understand Nationwide don't believe they should be held responsible for Mr M's loss as they say it didn't occur with them. I've taken into account that Mr M transferred the money into an account held in his own name with W, rather than directly to the fraudster, and so he remained in control of his money after he made the payment from his Nationwide account and that it took further steps before the money was lost to the scam. However, for the reasons I've explained, I am satisfied that it would be fair to hold Nationwide responsible for the loss Mr M suffered in relation to the second payment (subject to a deduction for Mr M's own contribution).

This is because the potential for multi-stage scams ought to have been well known to Nationwide and as a matter of good practice they should fairly and reasonably have been on the look-out for payments presenting an additional scam risk – including those involving multi-stage scams. And from their conversation with Mr M, Nationwide knew the funds were being used for investment purposes. It therefore ought to have been apparent to Nationwide that Mr M could've been at risk of falling victim to a multi-stage scam as he was sending the funds to another account in his own name rather than directly to the investment firm. And I think further enquiries would've more likely than not led to the scam being exposed, with Mr M not going ahead with the payment as a result. I therefore consider, in these circumstances, that it is fair to hold Nationwide responsible for this loss.

I've also thought about the payment being made to a regulated business, W. And that Mr M might potentially have a claim against W in respect of their actions - although I should note that W is not a party to this complaint and so I make no finding about their role here.

While DISP does give me the power (but do not compel me) to require a financial business to pay a proportion of an award in circumstances whereby a consumer has made complaints against more than one financial business about connected circumstances, Mr M hasn't referred a complaint about W. And DISP doesn't empower me to instruct Mr M to make or refer a complaint to the Financial Ombudsman about another business.

I am however required to consider the complaint in front of me and I have found Nationwide didn't act fairly and reasonably in the circumstances of this case. And while it is a possibility that Mr M may have cause to complain against W, I am not persuaded it would be fair to reduce the award solely for that reason. Mr M is entitled to choose to complain only about Nationwide and I am satisfied Nationwide could've prevented Mr M's loss if they'd acted fairly and reasonably.

I note Nationwide's concern that, should Mr M later raise a complaint with W, he may be refunded further which would lead to him receiving double benefit. I can't however take into consideration something that hasn't and may not happen. But should a complaint be later raised; it would be for W to decide whether to provide a refund of any kind. And while I can't instruct a firm – including W – on how they should undertake a fraud investigation, it would be good practice for them to consider what action – if any - was taken by other firms as part of a multi-stage scam. This includes whether any refund has been paid. Nationwide is also free to communicate their position with W should they wish to do so.

I've thought further about whether Mr M should bear responsibility for his loss. And in the absence of any additional arguments about Mr M's role in what happened, I remain of the same view that it would be fair to reduce the amount refunded by 50% due to contributory negligence for the reasons I've explained. Similarly, as no further comments have been raised regarding Mr M's loss of use of money, I likewise consider that Nationwide should also pay 8% simple interest per year to recognise his loss of use of funds from the point he repaid his daughter (23 December 2021) to the date of settlement.

### **My final decision**

My final decision is that I uphold this complaint in part. I direct Nationwide Building Society to:

- Refund £4,451.19.
- Pay 8% simple interest, per year, calculated from 23 December 2021 to the date of settlement less any tax lawfully deductible.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 4 March 2024.

Daniel O'Dell  
**Ombudsman**