

The complaint

Limited company C complains that Bank of Scotland won't reimburse it for a payment made by its director that resulted in the loss of the funds to an authorised push payment scam (APP Scam).

C's director, Mr J, has brought other complaints alongside this, but for the avoidance of doubt, the decision here concerns only C's complaint about Bank of Scotland and the scam payment made from C's business account held with that bank.

What happened

The parties here are aware of the circumstances of the complaint, so I won't recount these in detail here.

But in brief, in October 2022, Mr J was in the process of purchasing a property for rental investment purposes. He'd been corresponding with his conveyancer by email, and having signed the purchase contract, received an email asking for payment to be made.

The email said to use different account details to those previously advised. Mr J recalls noticing that the new payee's name appeared to be related to a garment company of some type. He tried to phone the conveyancer to clarify but there was no answer. Mr J says he simply assumed that one of the partners at the law firm maybe had a clothing business and had a reason to use that account.

Mr J then sent part of the required funds from his personal bank account, and part from C's business account. Both payments were made to the account number and sort code indicated in the email correspondence he'd received.

Shortly afterwards, it came to light that the genuine conveyancer hadn't received either payment. Apparently, someone had been able to hack into the conveyancer's email system and was thereby able to alter the account details.

C reported the scam to Bank of Scotland. C also reported it to the bank that received the payments, the complaint about which is also with this service, but does not form part of this decision.

Bank of Scotland attempted to recover C's funds. Some months later the beneficiary bank confirmed that part of the funds had been recovered. However, the remaining loss was greater than £50,000.

Bank of Scotland declined to refund the payment made from C's account – it didn't consider it was liable to do so. C had authorised these payments and Bank of Scotland had carried out C's instructions. C didn't accept this outcome and referred his complaint to this service.

As the matter remains unresolved, I have been asked to review everything afresh and reach a final decision.

I issued my provisional findings on the merits of C's complaint on 18 December 2023. In my provisional findings, I explained why I didn't intend to uphold C's complaint and offered both sides the opportunity to submit further evidence or arguments in response. An extract of that decision is set out below and forms part of this final decision:

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 was good industry practice at the time.

Upon reading all the available evidence and arguments, I have reached a provisional finding that the fair and reasonable outcome, in all the circumstances, is that Bank of Scotland is not liable to refund the payment made from C's account. I will explain why.

Both sides accept that the payment was a scam and has resulted in the loss of a significant sum of money. What needs to be determined here is whether Bank of Scotland should reasonably be held liable for the amount that was lost to the scam.

In considering this point, the first point to determine is whether the loss was sustained by C, I could not reasonably expect Bank of Scotland to reimburse a financial loss incurred by another party.

I understand that Mr J is the sole director of C. Mr J has explained to our Investigator that he considers C and himself to one and the same thing. But that isn't quite right. Mr J and C are separate legal persons - they are not one and the same.

Critically here, something owned (or being purchased) by Mr J in a personal capacity is not the same something owned or purchased by C.

Mr J confirms that the property purchase was being made solely in his own name (this is confirmed by the purchase contract). He confirms he'd receive the rental payments as personal income to his personal account. I'm satisfied he was making the payment for a property that would be owned in his own name and for his own benefit.

That has significant consequences for C's complaint about Bank of Scotland.

These payments had the effect of Mr J withdrawing an asset from C for his own use – Mr J effectively making a personal investment with that asset. I think it most likely such a payment would either constitute a loan from C to its director Mr J, or a return of capital, payment dividends or some other debt owed by C to Mr J. Mr J believes it was likely the latter of these possibilities, that C owed him the money, but the following logic also applies for the alternatives.

Unfortunately, Mr J then lost the funds he paid out, as a consequence of the scam. But C has not suffered a loss – Mr J has, which is not the same thing, as explained above. Rather, C discharged a debt to Mr J (or if instead this was a loan to Mr J, Mr J now owes the money to C).

It therefore follows that there is no loss on C's part for which the bank could fairly be held responsible. And Bank of Scotland did not have a customer relationship in respect of Mr J making a payment from C's account for a personal investment.

Similarly, I cannot fairly require Bank of Scotland to consider the payments under the terms of the CRM Code – C has not suffered a loss and so the payments do not fall

within the scope of what the code is intended to cover. Neither do I consider it fair and reasonable to hold Bank of Scotland liable for these payments for any other reason.

Mr J raises the question of forthcoming rules to mandate the reimbursement of scam victims. However, this has not yet been implemented and as currently drafted only applies to payments executed after the implementation of the scheme. So, it has no bearing on the disputed payment made in 2022.

While I appreciate this is not the answer C or Mr J were hoping for, all considered and given what I have set out above, I do not find it would be fair and reasonable in all the circumstances of this specific complaint for me to require Bank of Scotland to refund this payment.

In my provisional decision, I asked both sides to provide any further arguments or information by 19 January 2024, after which point, I said I would issue my final decision on the matter. C subsequently requested an extended deadline for its response to 9 February, which was agreed.

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 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, missing or contradictory, 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.

Responses to my provisional decision

Bank of Scotland did not submit any additional information or arguments.

C responded and didn't accept my findings. In summary, Mr J argued on C's behalf that:

- The property purchase as set out in the signed contract did not take place. The signed purchase contract had only been in Mr J's name because he'd been the person that had originally viewed the house. When the purchase had concluded, Mr J had always been planning to have this changed, so it would have been recorded in C's name instead;
- The company had suffered the loss, but the impact had principally been on Mr J as its director and the scam had caused substantial distress;
- Bank of Scotland hadn't intervened or protected C. Had the bank contacted Mr J the scam would have been prevented. The bank therefore lost C the money and C suffered the loss. The money had never gone to an account held by Mr J so this showed it was C that had suffered the loss not Mr J;
- The solicitor should have warned C and Mr J about this type of scam and did not do so, nor did the solicitor request a call to check bank details before making any transfer – again it should have done this;

- Mr J had emailed back to the solicitor's correct email address to check on the new account details;
- As a client of the solicitor for over 10 years, Mr J had total trust in the firm and had no doubt in their explanation that they were having trouble with the previous account. He knew there had recently been the departure of an employee who would have had access;
- It was possible one of the solicitor firm's owners had started a secondary business venture involving clothing, and that could have explained why the account Mr J paid was in the name of a clothing firm;
- The false account details were for an account with the same bank as the solicitor; and,
- When the payment was made, the account name Mr J had input was that of the solicitor's firm.

My further review

I've reviewed everything afresh in light of C's further submissions. However, my provisional outcome and the reasoning behind it remain unchanged. I will set out why in more detail below.

Firstly, I want to acknowledge the points Mr J has raised about the reasons the scam succeeded, including why he trusted the solicitor and the steps he took to validate the information he received.

However, before considering the question of fault or liability, I need to begin by establishing what loss has been incurred and by whom. There was a financial loss here. That loss corresponded to the payment made from C's account.

C argues that because the company made the payment, the company was the one that suffered the financial loss that followed.

I explained in my provisional decision that this does not necessarily follow – the fact of the payment being made from C's account is not sufficient in itself to show that C has suffered the loss rather than another party. The intended purpose of the payment is a relevant factor in answering that question.

Specifically, if the payment both was instructed by Mr J and intended for his personal benefit, then the loss was his. The fact it was made from C's account will not make it C's loss.

Our Investigator asked Mr J during a phone conversation whether the property being purchased was being bought in his own name or in the name of C. Mr J explains in response that he has a few properties, some held in his name and some in the name of C. He states that *"this one I was going to buy in my name"* and *"the property would have been registered in my name"*. These comments strike me as consistent and unambiguous.

That version of events is corroborated by the purchase contract he provided, which is entered into in Mr J's own name only and does not contain any reference to C (nor that it is being signed on behalf of C). Mr J also paid a portion of the funds required from his personal account. All of these facts are consistent with the purchase having been made by Mr J for his own benefit.

A payment made in such circumstances would most likely comprise either the discharge of a debt to C's director (such as the payment of a dividend) or alternatively could be intended to have been a director's loan. In either event the payment was made by Mr J from C's assets for Mr J's personal benefit.

The relevant payment instruction was created and authorised by Mr J himself, specifically including the details of the destination account he wanted credited (the unique identifiers of the account number and sort-code). The responsibility for any errors made in specifying the unique identifiers for the destination account Mr J wanted C to pay cannot properly be assigned to C. That applies even though the error in these account details was due to a third party deliberately deceiving Mr J. There is no doubt that Mr J intended this payment to go to the solicitor's account for the purpose of him purchasing the property in question.

All of that serves to mean that the loss was not one suffered by C. There is therefore no loss on C's part for which I can hold Bank of Scotland responsible. Furthermore, Bank of Scotland did not have a customer relationship in respect of Mr J making a payment from C's account for a personal investment.

That said, Mr J now disputes the property was being bought in his name. He says he'd been planning to change the purchase details prior to completion. Thereby he would have concluded the sale in C's name rather than his own.

This assertion is in contradiction to what, on the face of it, the other evidence appears to indicate. That includes Mr J's prior representations on the same point. Where evidence is contradictory, as I find it is here, I am required to reach my findings on the balance of probabilities – in other words, based on what I consider the most likely version of events taking into account the evidence before me.

Having carefully considered matters here, I find that the balance of the evidence points to the property having been most likely intended to be purchased in Mr J's own name. I cannot overlook the purchase contract not being in the name of C or making any reference to C - being drafted instead in Mr J's name. Further, there is nothing in that document or other records from the time which might indicate it was to be otherwise than it appears. I appreciate Mr J now says that didn't reflect his plans, but besides his assertion of this point he has provided no other evidence to support this. I find it more likely that Mr J's original testimony (which is consistent with the documentary evidence) is most likely the correct version. I cannot safely conclude otherwise.

Mr J has also argued that he and C are one and the same thing. But that is not correct. A limited company has a separate legal identity to that of its director. A property purchased in Mr J's name is not owned by C, nor vice versa. That distinction is relevant in various contexts including the proper taxation of the income earned by C or by Mr J – each is treated differently. So, while I understand that Mr J believes he and the company are indistinguishable, I find that they are nevertheless distinct legal persons, and are not the same thing. To say otherwise would be for me to depart from the law and there is no good reason for me to do so here.

Mr J argues that his conveyancing solicitor should have warned him about this type of scam and taken further steps to protect him. Mr J may be able to pursue that complaint directly with the solicitor if he considers it was at fault in this way. However, I only have the power to consider complaints about financial firms such as Bank of Scotland and I am unable to comment on the merits of any such complaint against Mr J's solicitor.

In conclusion, having looked afresh into all the evidence that's available to me and the points

and further information provided by C and Mr J, I don't uphold C's complaint. In saying that I want to clearly acknowledge that C's director, Mr J, has been the victim of a sophisticated scam here. He has explained the significant impact this crime had on him. I know he will be incredibly frustrated with the outcome I have reached.

But that doesn't make Bank of Scotland liable. The cause of what happened were the criminal actions of the scammers involved. And, while I don't underestimate the impact this crime has had on C's director, and I am correspondingly very sorry to have to disappoint him in the outcome I must reach, I can't fairly hold Bank of Scotland responsible.

My final decision

For the reasons given above and in my provisional decision, I do not uphold C's complaint about Bank of Scotland PLC.

Under the rules of the Financial Ombudsman Service, I'm required to ask C to accept or reject my decision before 22 March 2024.

Stephen Dickie
Ombudsman