

## The complaint

Mr C is seeking to recover £307,776 from Clydesdale Bank Plc (“Clydesdale”), which he lost from his account as the result of a third-party scam.

Clydesdale says it is not liable for the loss because Mr C unwittingly authorised the payment himself — and it could not reasonably have intervened or done more to try to recoup the money from the receiving bank.

## What happened

In December 2019, Mr C fell victim to a scam. Both Clydesdale and Mr C are aware of the circumstances surrounding this complaint, so I won't repeat them in full here. But briefly, both parties accept that Mr C was contacted by a fraudster, who had intercepted emails between Mr C and his genuine solicitor, regarding the payment of a deposit for a house purchase.

Mr C and his partner Ms C had decided to move to a more rural area and rent out their current property. They found a property to buy, and had their offer accepted about three months prior to the scam. They had agreed they wouldn't exchange until January 2020 at the seller's request. They were in regular contact with their solicitors during this process, meeting a couple of times in person and speaking a few times over the phone - but most of their communication took place over email.

In December 2019, Ms C and Mr C received an email from what appeared to be their solicitor asking when they would be transferring the funds. They agreed to send them over, were provided with account details and agreed to let their solicitor know when they had made the payment. Mr C attended a branch to make a CHAPS payment of £307,776 to the solicitors. He said he was asked what the transfer was for, who it was going to, the amount and the account details. Mr C said he told them the name and location of his solicitor and handed the branch staff a piece of paper which included the name of the solicitor, the amount and the account details that he'd copied down from the email. The branch staff filled in a CHAPS form and left their position to get authorisation for the payment from their superior due to the large sum of money involved. There was a 'take five to stop fraud' section on the form. Mr C said he signed off this section as he wouldn't have been in the bank if he thought he was being defrauded, but that he wasn't asked any further questions nor was there any detailed conversation about fraud and scams. He was told he'd receive a receipt later in the day. He then emailed who he thought was the solicitor and said that he had transferred the funds, and got a response thanking him for the payment.

Unfortunately, unbeknownst to Mr C, he had actually been corresponding with a fraudster who had been able to hack into the emails between him and his solicitor. The email address he was corresponding with appeared to be that of their solicitor, but there was a subtle difference in that there was an additional letter in the solicitor firm name within the email address. Mr C and Ms C exchanged emails with both the fraudster and the genuine solicitor during this time, not noticing that they were emailing two slightly different email addresses. There were some delays in their communication with the real solicitor, and so the scam didn't come to light until early in January 2020 when the real solicitor confirmed they had not received the funds. The solicitor later confirmed that the emails containing

the payment instructions and account details weren't sent from their firm. Mr C contacted Clydesdale and the police – though the perpetrator has not been apprehended at this time.

Mr C said he went into branch in January and spoke to the branch management. He said they appeared visibly shocked and admitted they were surprised that neither of the branch staff involved in processing the payment flagged up anything suspicious. He said this was because the account name and the name of the solicitors were completely different. He said that the branch management said they should have asked further questions about the discrepancy between the names, and more generally about the payment, and went so far as to describe the kind of questions they would have asked.

Mr C said he emailed the manager he'd met in branch in January to ask for a copy of the notes from their meeting and was told that they were compiling them into a complaint form. When Mr C didn't hear anything further, he contacted a new solicitor who corresponded with Clydesdale and solicitors acting on their behalf. There was a fairly comprehensive back and forth between the solicitors, which included legal arguments and caselaw which I have considered but I won't repeat in full here. But in summary, Mr C, through the new solicitors, complained that:

- Clydesdale should have flagged that the payment was suspicious and done further checks – they had not queried the discrepancy between the solicitors' name and the account name, and the payment was of such a substantial size that it should have prompted further checks and security measures;
- Clydesdale failed to carry out basic checks, or offer any advice or warnings about the risk of fraud and scams and instead relied on a section of the form entitled 'take five for fraud' which gave general warnings about fraud that were not specific to this particular type of scam;
- Had they completed further checks and educated Mr C, the scam could have been revealed and the loss prevented;
- Clydesdale hadn't complied with their obligations as outlined by the Financial Conduct Authority ('FCA') regarding paying due regard to the interests of their customers, treating them fairly, and taking reasonable care in dealing with transactions;
- Clydesdale failed to meet the standards they publicly purported to meet in relation to recognising and preventing potential scams, and the recovery of funds following a scam;

Clydesdale, through their solicitors, said:

- They cannot be held liable for carrying out their legal duty to process a valid transaction, authorised by Mr C with the details he provided;
- They had made the required fraud prevention and anti-money laundering checks before proceeding to process the transaction;
- Mr C reviewed the form and signed it to authorise the payment, and in addition signed the 'take five for fraud' warning confirming that he had been alerted to the possibility of fraud and was content to proceed with the payment;
- They were entitled to assume that Mr C provided them with the correct beneficiary account details. They had not been required to verify beneficiary names at the time of the payment, and the discrepancy did not appear to cause Mr C any concern when he was provided it by the fraudster, handed it over in branch, or signed it off on the CHAPS form;
- Mr C's remedy was not against them, but instead against the fraudsters. The bank

trusted that the relevant authorities were taking all possible steps to pursue the criminals. They also trusted that Mr C's solicitors were advising him on the potential civil recovery methods including tracing of the funds;

- They were not signed up to the Contingent Reimbursement Model ('CRM') code at the time of the transaction, so it does not apply in this case. But they did follow the UK Finance Best Practice Standards for APP scams and complied with all of their legal and regulatory requirements in Mr C's case;
- The terms and conditions of the CHAPS payment and Mr C's account expressly provide that he would be solely responsible for the accuracy of the information including the beneficiary account name, number and sort code. The terms and conditions also stated that they would not be liable for any loss he or the beneficiary suffered as a result of inaccurate information being given on the request;
- Even if Clydesdale was given the solicitors' name, which they do not accept, they did everything required of them and are not be responsible for any of his losses;
- Even if Clydesdale had not done everything required of it, which was not accepted, they would be resolved of liability due to the CHAPS terms and clauses, and current account terms and conditions.

After the solicitors failed to reach an agreement, Mr C came to our service. Our investigator reviewed what happened. They recommended that the complaint be upheld because:

- The payment was unusual and out of character for Mr C's account, when considering the usual account activity and the proportion of the available funds that it used;
- Clydesdale should have recognised the risk of fraud and should have intervened by making further enquiries about the payment before processing it;
- Had Clydesdale asked Mr C further questions about the payment details and educated him about this prevalent type of scam, it is most likely that the scam would have been uncovered and the payment to the scammer would not have gone ahead.

So, they asked Clydesdale to refund the £307,776 and pay 8% simple interest on this sum from the date the funds debited Mr C's account until the date of the settlement.

Clydesdale did not agree. They said:

- The finding was made in reliance upon a factual error – namely that Mr C had told them the name of the solicitors firm the payment was meant to be going to.
- That our investigator's recommendations were at odds with the relevant law in this area. They said banks have a duty to process the payment instructions of its customers. And there was no duty for a bank to prevent APP fraud against its customer. They said that banks are not required to refund payments to their customers where the payment instructions themselves were valid, but the customer has been provided with fraudulent details by a third party. Whilst it acknowledges it has a duty to exercise reasonable care and skill in doing so, this doesn't extend to having to question a customer's instructions or to assume liability where it followed their customer's payment instructions. To support its conclusions, it pointed to the judgment set down in the case of Philipp v Barclays.
- Even if they had verified the payee account details the outcome would be the same – Mr C knew the name of the account he intended to pay didn't match the name of the solicitor, and they sent the funds to the account he requested.
- They queried why Mr C had decided to abandon his legal claim in favour of raising a complaint with our service, after such a long time. Had he been so convinced that the

bank were in some way culpable for the loss, they would have expected the complaint to have been raised against them at the time of the loss not many months later. They said it appeared that the security breach had happened on Mr C's emails rather than the solicitor's, and so they had probably been told to pursue Clydesdale over their solicitors as this would have little chance of a successful claim.

- They didn't agree the payment was unusual – a large one-off payment for the event of a house purchase is something their branch staff would encounter on a regular basis.
- They also said they had seen CCTV from the time the payment was made, and in it Mr C appears to be quite disengaged with the process and spends a lot of time on his phone. The teller would have gone over the payee details and the fraud warning with him. They believe the most likely scenario was that Mr C hadn't told them the solicitor's name, and simply asked for a payment to be given to the account details he provided. They felt the average person dealing with such a significant financial commitment as a house purchase would have queried the discrepancy between their name and the account name before proceeding with a payment.
- They don't believe further questioning would have revealed the scam to Mr C, as he was of no doubt about the payee details when he was at branch on that day. He believed he was following instructions provided to him, that had been communicated to him via an established and trusted method by a trusted sender.

Our investigator's opinion remained the same. They said that even if they were to accept that Mr C had not mentioned his solicitor's name at the time of the payment to the fraudsters, they would still recommend the complaint be upheld. This was because they would still expect Clydesdale to ask further questions around what was clearly an unusually large payment. They remained of the opinion that further questioning would have allowed for the scam to have been discovered, thus preventing Mr C's loss. As no agreement could be reached, it has come to me to decide.

### **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, I have concluded that the fair and reasonable outcome, in all the circumstances, would be to uphold this complaint. I'll explain why.

It is common ground that Mr C authorised the payment that is now the subject of this complaint, even though he did so as the result of being deceived by fraudsters. In broad terms, the starting position in law is that a bank is expected to process payments that a customer authorises it to make, in accordance with the Payment Services Regulations (PSRs) and the terms and conditions of the customer's account. So, the starting position is that Mr C would be held liable for the transaction.

However, 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 Clydesdale 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 (amongst 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, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

I want to stress that I am aware of the case of Philipp v Barclays that Clydesdale has directed me to. And notwithstanding what the judge said, we have a duty to resolve complaints based on what we think is fair and reasonable in all the circumstances of the case, taking into account not just the law, but also regulators' rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time. And I'm satisfied given what I've set out above, that there are certain scenarios in which Clydesdale should ask questions about a payment before it processes it on its customers behalf – it should be on the look-out for unusual and out of character transactions.

Having reviewed Mr C's account activity prior to the fraud, I agree with our investigator that the payment was unusual and out of character for Mr C's account. There were no comparable payments in terms of the size of the payment. I understand that Clydesdale argue that a large one off payment for the event of a house purchase is something their branch staff would encounter on a regular basis – but this does not negate the fact that the payment was unusual and out of character for Mr C's account. Given that I am satisfied that this payment was unusual and out of character, I think Clydesdale ought to have done more than confirmed what the payment was for, who it was going to, and reviewed the 'take five for fraud' section on the CHAPS form. They needed to satisfy themselves that Mr C was not at risk of financial harm from fraud.

And so I'm satisfied Clydesdale ought fairly and reasonably, and as a matter of good practice, to have done more here - I think they ought to have made enquiries about the purpose of, and the circumstances leading up to, the payment before they processed it. I'm satisfied that if Clydesdale had questioned Mr C in this particular case, the scam would have been revealed and prevented. I'll explain why.

Much of what happened in branch on the day in question is agreed between both parties – with the notable exception of whether Mr C told them the name of his solicitors and where they were based. But it is agreed that Mr C explained he was buying a property, and the funds were being paid to his solicitors in relation to this. It is agreed that the form was completed, and Mr C signed the form, including the 'take five for fraud' section. There may have been a conversation generally about fraud and scams at this point. But I think it is most likely that the conversation didn't cover the type of scam Mr C fell victim to.

Mr C fell victim to a scam which is sadly all too common – an "email intercept" scam. And it's a type of scam I'm satisfied Clydesdale ought to have been aware of at the time. Had Clydesdale questioned Mr C further, he would most likely have told them he was making the payment at the request of his solicitor. At this point, being aware of the prevalence of this type of scam and its common characteristics, Clydesdale would have had the opportunity to question him further.

A particularly common feature of this type of scam is that a customer will receive an email that appears to be from the genuine business they are in contact with. This email will contain payment details which will, unbeknownst to the customer, direct the payment to a fraudulent account.

This is a common scam with very particular characteristics, and I'm satisfied Clydesdale ought fairly and reasonably to have asked Mr C how the payment details had been communicated to him. He would have told Clydesdale they had been sent to him by their solicitor, by email. Clydesdale could then have educated him about this type of scam and its key characteristics. Clydesdale could have asked Mr C to check before continuing with

the transfer - they could've advised him to contact his solicitor using an established contact number, to confirm the account details were correct. Had Clydesdale done so, I'm persuaded that this would likely have produced some doubt in Mr C's mind that the payment details may not be legitimate, and he would have contacted his solicitor before proceeding with the payment. After all, this was a significant amount of money and Mr C may not have been aware previously that this type of scam was even possible. I'm persuaded that once informed of this, he would have taken some steps to verify the account details provided to him – had Mr C done so, I'm persuaded that the scam would have been prevented and no loss occurred.

In summary, I'm persuaded Clydesdale ought fairly and reasonably to have encouraged Mr C to confirm the account details he'd been sent. His circumstances had the hallmarks of a well-known scam. And Clydesdale should have explained the risks of scams involving the interception, altering and hacking of emails which would have prompted further action from him. In other words, if Clydesdale had carried out further or better questioning, it seems probable that Mr C would have contacted his solicitor by phone just to make sure everything was as it should be. At this point, the scam would have come to light. The fraud would have failed; and he would not have lost the money he sent to the fraudsters.

There has been much said by both parties on the subject of whether Mr C told Clydesdale the name of his solicitors, and if he did, why Clydesdale didn't recognise this as a sign that Mr C was at risk of fraud. For completeness I'd like to deal with this briefly. Whether Mr C told Clydesdale the name of the solicitors in the meeting or not, the outcome of this case remains unchanged. The payment should have flagged as unusual and out of character regardless of this and prompted further questioning.

I have also considered whether Mr C should bear some responsibility for his loss. However, it is clear that up to and including the time of authorising the payment, Mr C was still totally in the dark and simply did not appreciate what he was doing – he thought he was making a legitimate payment to his solicitor in order to purchase property. I am satisfied there was no contributory negligence on this occasion, Mr C was the unwitting and blameless victim of a clever fraudster. The bank was the professional in financial matters; Mr C was the layperson.

Finally, I've thought about Clydesdale's actions when Mr C told them in January 2020 that he'd fallen victim to a scam. Unfortunately, whilst the payment was made in December 2019, the scam did not come to light until 6 January 2020. When Mr C reported the scam, Clydesdale acted quickly and contacted the receiving bank the same day. They were told that negligible funds remained in the account, but the receiving bank said they would chase the second-generation funds. Clydesdale chased the receiving bank on 6 March 2020, and at this time no funds were able to be recovered from the receiving bank. I am satisfied that Clydesdale did what they could here – there was nothing further Clydesdale could have done to recover the funds.

### **My final decision**

My final decision is that Clydesdale Bank Plc should refund £307,776 to Mr C. It should also pay simple interest on that sum at 8% per annum from the date of the loss to the date of the refund.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 13 April 2022.

Katherine Jones  
**Ombudsman**