

The complaint

Mr and Mrs T complain that NM MORTGAGES LTD, a firm which had given them mortgage advice, didn't keep their personal data safe. As a result, they've been the victims of identity theft.

What happened

Mr and Mrs T used NM for mortgage advice for both their residential and buy to let properties, in connection with which it took and retained their personal data.

In 2020, NM discovered that former staff had been involved in possible criminal activity. It identified a small number of customers who might have been affected, including Mr and Mrs T. It was concerned that the personal data of those customers might have been stolen from its systems. It notified Mr and Mrs T that their personal data might have been taken without consent and offered them advice on how to protect themselves against fraud.

Separately, Mr and Mrs T discovered that they had been the victim of an identity theft. A fraudster had changed their contact details on some of their mortgage accounts. Loans had been taken out in their names without their knowledge, and other fraudulent activities had happened too. As a result, Mr and Mrs T's credit files were affected and they were refused a car loan and had the limits on their credit cards reduced. They spent time and money checking their credit files, notifying financial firms and correcting the fraudulent changes that had been made, and taking steps to protect themselves from future fraud.

It seems likely that the problems Mr and Mrs T had resulted from the likely data breach NM had identified. Mr and Mrs T complained to NM.

NM said that it couldn't be sure that their personal data had been taken. But it offered Mr and Mrs T compensation of £250 for the upset they had been caused. And it offered £324.80 to cover the costs Mr and Mrs T had incurred in checking their credit files and registering themselves on a fraud prevention database. It said it did so without admission of liability.

Our investigator didn't think that offer went far enough. She noted that NM had only offered to pay for the costs of credit file and fraud database checks up to May 2021 – but as Mr and Mrs T were being affected by this issue after that, she said it should also refund costs incurred since May 2021 subject to Mr and Mrs T providing evidence of the costs they'd incurred. And she said NM should increase its offer of compensation from £250 to £850. As NM didn't respond, the case comes to me for a final decision to be made.

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.

I'm satisfied I have jurisdiction to consider this complaint. I say that because NM advised Mr and Mrs T on both residential and buy to let mortgages. And while advising on buy to let

mortgages is not a regulated activity within the jurisdiction of the Financial Ombudsman Service, advising on a residential mortgage is. And I'm satisfied that holding Mr and Mrs T's personal data and keeping it safe is part and parcel of the service of providing regulated mortgage advice.

NM has shared with us the broad outlines of the problem that occurred and its investigation, though not the detailed evidence that sits behind it. However, it seems that an employee or employees may have accessed and retained the personal data of customers of NM. I've noted what NM has told us of its investigation. And I've also noted that at least part of the fraud Mr and Mrs T were victims of required detailed knowledge of their mortgage accounts, arranged through NM. I'm satisfied that it's more likely than not that the identity theft Mr and Mrs T experienced is linked to the data breach NM identified.

However, as it seems that the data breach was caused by a former employee or employees of NM acting fraudulently, I need to consider whether it's fair and reasonable to hold NM responsible for what happened – or whether it's solely the responsibility of the former employee(s).

In deciding what's fair and reasonable in all the circumstances, I need to take into account – amongst other things – relevant law. The leading case involving a firm's liability for data breaches by employees is *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12, which I've taken into account.

In that case, a rogue employee stole the personal information of other employees of the company and published it online. The Supreme Court held that the relevant question in such cases was whether the employee's unauthorised act was so closely connected with acts he was authorised to do that, for the purposes of the liability of his employer to third parties, his wrongful act may fairly and properly be regarded as done while acting in the ordinary course of his employment. In *Morrison's*, the court considered that there wasn't a sufficient connection between what the employee did and what he was authorised to do to make the company vicariously liable for his actions.

In my view, there are differences between that case and this one. And in applying the principles set out in *Morrison's*, I think NM should be held liable for the actions of its employee(s) in all the circumstances of this complaint. In this case, although NM has told us little about the detail of what happened, it seems from what it has said that persons employed to advise on and arrange mortgages used personal information gathered from customers in the course of arranging mortgages to fraudulently change details held by lenders on mortgages that had been arranged – which is one part of the problems Mr and Mrs T experienced. And those persons also seem to have retained customer information for their own, fraudulent, use.

Passing information between borrower and lender is part and parcel of the activity of arranging a mortgage. And the employee(s) were authorised to pass customer data to lenders as part of their role. Customer data seems to have been manipulated at some point before information was passed to the lenders so that it was incorrect. I consider this manipulation of data to be so closely connected with the acts that these employee(s) were authorised to do that it can fairly and reasonably be regarded as done by them while acting in the ordinary course of their employment. That means, in my view, that it is fair and reasonable that NM, as their employer, should be held liable for these acts.

A further factor is that in this case Mr and Mrs T were customers of a regulated firm engaged in a regulated activity. And as a regulated firm carrying on regulated activities, NM owes Mr and Mrs T further duties beyond those owed by *Morrison's* to its employees in the case I've cited above.

For example, NM owes a broad duty as a regulated firm to pay due regard to the best interests of its customers and treat them fairly. And a customer of a regulated firm entrusting that regulated firm with financial and other sensitive data is entitled to expect the firm to keep it safe.

In deciding the outcome here, our rules require me to decide what's fair and reasonable in all the circumstances. In doing so, I'm required to take into account relevant law – but I'm not required to follow it if I consider doing so would not be fair and reasonable in all the circumstances.

I've taken into account what the Supreme Court said about the liabilities of a company for data breaches by employees. Having done so, on the facts of this case, I think it's likely a court would conclude that there was a sufficiently close connection between the employees' authorised actions and the data breach to say that NM is liable for the actions of its employee(s).

And in any event, even if I'm wrong about that, I still think it's fair and reasonable in all the circumstances for me to uphold this complaint. I say that because the Supreme Court case was solely about whether an employer is vicariously liable to its employees for a breach of data protection law. Even if, as a matter of law, NM is not vicariously liable to Mr and Mrs T for a breach of data protection law, it has broader obligations as a regulated firm acting for customers of its regulated activities. These include paying due regard to their interests and treating them fairly.

When a customer of a regulated firm entrusts the firm with sensitive financial and personal data as part of a regulated service the firm is providing, they're entitled to expect that data will be kept safe and confidential and not accessed by fraudsters or manipulated for fraudulent purposes. That did not happen in this case.

While there's no suggestion NM deliberately or negligently allowed Mr and Mrs T's personal information to be stolen and used for identity theft and fraud, the fact is that it didn't keep their data safe – and that means that, even if not deliberately, the outcome was that it didn't treat them fairly. And in my view it's therefore fair and reasonable that it compensates them for the consequences of not keeping their data safe.

I also note that NM has already offered compensation to Mr and Mrs T. While it did so explicitly saying that it made the offer as a "gesture of goodwill" without admission of liability, the fact is that NM itself has already decided that it ought fairly to compensate Mr and Mrs T for what happened to them. It's offered to refund some of the costs they incurred, and to compensate them for the upset they experienced. I'm satisfied it's appropriate for me to consider whether that offer represents fair compensation in the circumstances.

Putting things right

I've noted what Mr and Mrs T have said about the impact of the fraud and identity theft on them. There has been considerable disruption and upset over several years. They've had to deal with a number of financial providers to correct information wrongly changed or resolve loans taken out in their names. They've described the consequences for them of the damage caused to their credit files – including being refused credit and having existing facilities withdrawn or reduced. They've had to repeatedly check their credit files and follow up suspicious activity. I'm satisfied they've been put to substantial inconvenience over a prolonged period of time – and also significant worry both about what has happened and what might have happened and might still happen. In all the circumstances, I agree with our investigator that £850 is a more appropriate award of compensation than £250.

I also agree that it's reasonable that Mr and Mrs T have continued to check their credit files after May 2021, and so NM should reimburse the costs they've incurred, subject to Mr and Mrs T providing evidence of those costs.

My final decision

For the reasons I've given, my final decision is that I uphold this complaint and direct NM MORTGAGES LTD to:

- Pay Mr and Mrs T £850 compensation;
- Reimburse the costs Mr and Mrs T have incurred in checking their credit files and in registering with fraud prevention databases, from August 2020 to August 2022, subject to Mr and Mrs T providing evidence of the costs incurred. NM MORTGAGES LTD should add simple annual interest of 8% running from the date Mr and Mrs T paid each invoice to be refunded to date of refund.

NM MORTGAGES LTD may deduct income tax from the 8% interest element of my award, but should tell Mr and Mrs T what it has deducted so they can reclaim the tax from HMRC if they are entitled to do so.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs T and Mr T to accept or reject my decision before 20 October 2022.

Simon Pugh
Ombudsman