

complaint

Ms W (on behalf of Mr W's estate) complains that National Westminster Bank Plc (NatWest) allowed a third party (Mr B) to make payments from Mr W's account between 2003 and 2007 and failed to identify the payments were part of ongoing financial abuse.

background

Unfortunately, due to the time that's passed, some information is not available but here is the background as I understand it from what has been provided.

In February 2003 Mr W put in place an Enduring Power of Attorney (EPOA) in relation to all his property and affairs with no specific restrictions – here he appointed his neighbour (Mr B) as his sole Attorney. He also added Mr B as a signatory to his accounts with NatWest.

Following this, Mr B transferred funds from Mr W's savings vehicles to Mr W's current account. Over the next couple of years funds were regularly withdrawn using various methods including cash withdrawals, cheques and bank drafts.

Ms W raised concerns with the relevant authorities about the wider situation in which Mr B had taken over Mr W's care, this included her concerns about Mr B's involvement in Mr W's finances, but Mr B was allowed to remain Mr W's Attorney.

The EPOA was registered with the Court of Protection (COP) in January 2005 indicating Mr W no longer had mental capacity to manage his affairs and extended Mr B's legal authority to deal with and manage Mr W's accounts. At this point Mr B informed NatWest of this development and of Mr W's new residence at a care home.

In 2006 Mr W's home was sold. In 2007, from the proceeds, Mr B made a £60,000 swift payment marked as an 'urgent transfer' in branch to a foreign account in his own name. In January 2008 Mr B informed NatWest of his change of address, and that he was resident in France.

In April 2008 the Office of Public Guardian (OPG) informed NatWest it was investigating a complaint about Mr B's management of Mr W's financial affairs. And in August 2008 the COP revoked the EPOA – it made a finding that Mr B was unsuitable and appointed Ms W in the interim. Ms W updated NatWest and informed it of her concerns – here she requested information to help her investigate the financial activity on her father's accounts. Unfortunately, Mr W passed away in 2009.

Ms W took civil action and in 2012 a High Court Judgement ordered Mr B (and in part his wife) to repay over £200,000 (including, but not limited to, funds removed from Mr W's NatWest accounts) to Ms W, as the administrator of Mr W's estate. However, Ms W has been advised that Mr B was declared bankrupt in France and so there are no assets to recover. Ms W has said she will inform NatWest if the position changes and anything is recovered.

The police also sought criminal charges and Mr B was extradited but there were delays to his trial. In 2017 Mr B pled guilty (to some, but not all, of the charges) and was sentenced. Ms W says NatWest should have done more to identify the financial abuse and protect Mr W. In particular, she thinks it failed in the following ways:

- To identify Mr W as vulnerable

- To identify the change in account activity as concerning – including spending patterns and change to his asset level.

Ms W is complaining about the activity from 18 March 2003 onwards as this is when she thinks NatWest ought to have identified something was wrong – there were two large bankers drafts in branch on this date totalling £6,800 and a cheque for £2,000. Ms W's requesting NatWest refund just under £45,000 for payments over 2003 - 2004 and the £60,000 international payment in 2007, plus interest. Ms W has asked that we consider the matter as two complaints due to our award limits and highlighted why she thinks they are distinct, including:

- The time separating the activity in 2003-2004 and 2007
- The EPOA being registered in 2005.

NatWest says all the payments were authorised and the governing body responsible for monitoring the actions of an Attorney is the Office of the Public Guardian (OPG), the administrative arm of the Court of Protection. The OPG have the authority to investigate any alleged misappropriation by an Attorney and any concerns about an Attorney's actions can be raised with them.

NatWest opposed our service's consideration of this case due to the time that had passed and because there has been some court action. But it has since accepted that we can consider the matter.

NatWest has also said that it couldn't have known the disputed spend wasn't for Mr W's benefit. It's used the example that purchasing a car could have been to help take Mr W out, and that the building costs could have been to improve Mr W's home. It has also highlighted that it was not made aware of the parallel events in relation to Ms W's concerns and correspondence with the OPG or other official bodies.

Our investigator upheld the complaint in part. He thought NatWest ought to have identified the £60,000 payment in 2007 was suspicious and concluded that if NatWest had taken appropriate steps this loss would likely have been prevented. NatWest didn't agree with the investigator's reasoning but did offer to refund this payment as a gesture of goodwill. It also offered to apply interest but to cap the total award at £100,000.

I let both parties know that I thought it was appropriate for this to be treated as one complaint and that this offer was fair in the circumstances. I explained:

- The disputed payments all stem from ongoing financial abuse by Mr B.
- The disputed payments were all authorised in line with the account terms.
- I didn't think NatWest fell short of expectations at the time of the payments between March 2003- December 2004.
- I agreed the 2007 payment ought to have been treated as suspicious and so it was right for this to be refunded, but said I thought it was fair to cap the interest as proposed by NatWest.

Ms W didn't accept this offer, she reiterated her request for the complaints to be considered separately. Ms W also requested a refund for the 2003-2004 transactions and said:

- NatWest didn't understand the limits that the law places upon the use of a Donor's assets by an Attorney. She referenced, amongst other things, the Enduring Powers of Attorney Act 1985 and Mental Capacity Act 2005.

- The payments went beyond the scope of the Attorney's authority under the EPOA and donors shouldn't be bound by anything done outside of their authority. Ms W doesn't agree the payments are authorised.
- NatWest should have treated payments after it was aware Mr W was in a care home with more caution.
- Only NatWest had the information needed to identify the abuse, Ms W thinks the COP would have revoked the POA sooner if it was aware of the account activity.
- As a result of NatWest's inaction Ms W took civil action in the High Court.

my findings

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'm upholding this complaint in part. I still think the offer of £100,000 in settlement of this complaint is fair in the circumstances and I'll explain why.

Firstly, I'd like to acknowledge how awful it is that Mr W was taken advantage of in this way and that this matter has been ongoing for a significant period of time. I understand there were several official bodies involved with a role in safeguarding Mr W. All parties here have accepted that Mr W was the victim of financial abuse, and the courts have concluded who the perpetrators were. This includes a civil judgement and a criminal sentence. Both are about the liability of Mr B rather than NatWest and neither have led to the recovery of funds to the estate of Mr W. For clarity my findings are limited to NatWest's role as Mr W's bank at the time – more specifically in relation to the disputed payments from Mr W's accounts held with it.

This means that I don't need to make a finding on whether the disputed funds were taken as part of ongoing financial abuse of Mr W by Mr B. As Ms W (on behalf of Mr W's estate) has not recovered any funds from Mr B or his wife, I'm satisfied it's still appropriate for me consider the losses to Mr W's estate as a result of any erroneous acts or omissions by NatWest.

Should this be treated as more than one complaint?

The rules on our jurisdiction to consider a complaint are set out by the Financial Conduct Authority's Dispute Resolutions Rules. Ms W has made some relevant arguments for why she thinks our service should treat this matter as more than one complaint; the time that passed between the payments and the registration of the EPOA in 2005. I've thought about this carefully and I'm satisfied that it is correct to consider the disputed payments complained of here as a whole – I'll explain why. While there was indeed a significant period of time over which these disputed payments took place, they all stem from the same core ongoing issue – that of financial abuse by the Attorney that Mr W authorised to act on his behalf. Registering the EPOA gave Mr B further authority in relation to other matters, such as selling Mr W's property, but Mr B was already a signatory on the account making payments, so I don't think this substantially changed the basis on which Mr B was interacting with NatWest or his authority to make payments. I note, in this case, whether we treat this as one complaint or more hasn't affected the outcome or redress that I think is fair.

Were the payments authorised?

The terms and conditions of Mr W's account set out the relationship between NatWest and Mr W at the time. These are the starting point for how a customer can give instructions to make payments from the account. When Mr W added Mr B as a signatory to his account with NatWest this gave Mr B the authority to make payments from his account.

Neither the EPOA from 2003 or when it was later registered with the OPG in 2005 provided any specific restrictions on the activities intended to be covered. So, this wouldn't have restricted Mr B's authority to continue operating Mr W's accounts. For these reasons, all the disputed activity was authorised in line with the terms and conditions of Mr W's account.

I understand Ms W's points around the scope of an Attorney's authority being set out in law and that there are important principals within this. Particularly in relation to an Attorney's responsibilities and who they can gift funds to. But those matters are more relevant to whether Mr B ought to have been or remained Mr W's Attorney which was for the OPG and COP to consider. Similarly, these are points that the courts would likely have considered in relation to Mr B's civil and criminal liability. They don't, however, change the fact that the payments instructions were given to NatWest by a signatory to Mr W's accounts and correctly authorised.

There is, however the matter of whether it was fair and reasonable for NatWest to have treated these payments as authorised or allowed them to go ahead in all the circumstances, and I'll go on to that next.

Should NatWest have allowed the payments?

Whilst the payments were all authorised, there is still the question of whether NatWest ought to have done more to identify and prevent this financial abuse. I agree that Mr W's vulnerability and account activity are relevant considerations in this respect. We now have the benefit of hindsight and I'm mindful that what is expected of banks like NatWest has changed significantly over time – particularly in relation to protecting vulnerable customers. So, for clarity my findings are based on the relevant requirements and good practice at the time of the payments, and what NatWest would have (or ought to have) been aware of at the time.

In relation to the payments between 2003-2004, bearing in mind what NatWest knew at the time, I don't think it would be fair to conclude that it ought to have identified that these payments were of concern or not in their customer's interests. I've reviewed the account activity from December 2001 onwards and saw that Mr W had made large payments and withdrawals before those being disputed. This included several cheques for around or over £1,000.

I understand Ms W's point about the transactions on 18 March 2003, on the face of it this was a lot of money. But the two large banker's drafts were to a garage and to a glazer's – NatWest has said it would have had no reason to doubt that these were for Mr W's benefit, it has suggested a reasonable assumption would have been that these were for repairs to Mr W's home and that the purpose of purchasing a car was to transport him. Unfortunately, we don't have full details of what was discussed when Mr B went in branch and so we can't know for certain, but I find it would have been plausible these were for Mr W's benefit and part of Mr B role as Mr W's Attorney. And I don't think the cheque would have appeared particularly unusual for the account.

The payments from the account were regular and over time a significant amount was taken. But at the time I don't think any of the payments between 2003-2004 would have been significantly large or different enough to conclude that NatWest ought to have done more. I'm also not persuaded that had NatWest taken steps to further understand the purpose of any of these payments that it would have changed how events unfolded. As the authorised signatory on the account was the perpetrator, he would have likely confirmed these were intentional payments for the benefit of Mr W. I note a significant quantity of payments were linked to the building trade which Mr B was in, and it would have been quite plausible that these payments were to make improvements to Mr W's home.

I understand that there were also several cash withdrawals and that Mr W had not previously operated his account this way. But I don't think it would have been concerning in itself for there to have been a change in how funds are accessed when a different person is operating the account. In relation to the cheques made out to Mr B's wife, I've addressed earlier that whether Mr B, as an Attorney, could make gifts like this is not a matter for NatWest to have determined at the time. Mr B would have been allowed to make payments to others for many reasons for example if Mr W was expected to provide for that person's needs and it wasn't NatWest's role to monitor this, but that of the OPG.

I've also taken into account that Mr W's balance was initially increased when Mr B moved Mr W's savings into the account. And the balance was then run down slowly over the course of around two years. Mr W was receiving incoming payments and the balance was mostly in the thousands, so I don't think there's a clear point in 2003-2004 where NatWest ought to have identified the financial abuse.

However, I agree with the investigator that the £60,000 payment in 2007 ought to have received more scrutiny and there are many ways in which it stands out. But given NatWest has offered to reimburse this, I won't go into making a detailed finding on this point.

Turning to what redress is fair here, our service is not punitive and any interest we award is to recognise the detriment caused by the funds not being available. Here, I think what ought to have happened is for the £60,000 payment in 2007 not to have taken place and so it would have remained in that account until needed to care for Mr W, for example his care home fees.

I gather once Mr W's own money ran out Ms W took over paying for his care and needs until he passed in 2009. It appears had the £60,000 not been taken in 2007 that these funds would have been fully utilised before his passing or shortly afterwards. So, the deprivation of these funds is only for a period of time, rather indefinite. The £40,000 in interest being offered by NatWest would cover the likely period that Mr W or his estate were without these funds as a result of an error by NatWest. And our powers don't extend to compensating third parties for their losses.

It's unclear whether Mr W was aware of or distressed by the situation between 2007-2009 given his health conditions. So, I don't think any further award would be fair in the circumstances –

my final decision

My final decision is that National Westminster Bank Plc's offer to pay the estate of Mr W £100,000 is fair in the circumstances. This represents a refund of £60,000 and an interest payment of £40,000.

If, when making this payment, National Westminster Bank Plc makes any tax deduction for the interest element of this award then it should inform Ms W and provide her with a tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms W (on behalf of Mr W's estate) to accept or reject my decision before 30 January 2021.

Stephanie Mitchell
ombudsman