

The complaint

Mrs S complains on behalf of her late husband's estate that Northern Bank Limited (trading as Danske Bank) won't refund credit card transactions which the late Mr S said he didn't make or otherwise authorise.

What happened

Back in 2019, Mr S held a credit card with Northern Bank and made a payment towards the account of around £22,000 in June that year. He did so with the intention of spending money on the card while travelling. Due to the balance and limit of the card at the time, this payment took the account into a significant credit balance. That is, instead of using the credit facility provided by Northern Bank, this payment meant Mr S would in fact be spending his *own* money until the credit balance was used up.

Mr S went on a planned trip to Benidorm in July 2019 and took the card with him to use. One night, Mr S entered an establishment ("D"). According to his version of events, he entered this nightclub and agreed to spend some money on alcohol and certain services which were offered to him over the course of a few hours. Mr S recalled paying for all of this by inputting his card into a card machine, together with entering his PIN.

As he remembered it, on 15 July 2019, the morning after visiting D, Mr S woke up in a wasteland some distance from both D and the hotel he was staying at. It was that morning that he first realised his credit card was no longer with him and he also didn't have any cash left. Mr S explained that he was alone and only managed to find his way back to where he was staying by getting assistance from a stranger who found him stranded.

Mr S said that he did endeavour to notify Northern Bank that he was without his card that same day – but was unable to get in touch with the bank or communicate via bank branches nearby his hotel. Because, as he described it, staff at these branches were unhelpful. So, all of this was first reported to Northern Bank when Mr S returned back to the UK a week or so later. In the meantime, he'd seen out the remaining few days of his holiday, relying on the pre-paid package he had at his hotel. As his food, accommodation and travel back to the UK had already been paid for he was able to get home.

Upon visiting his branch, Northern Bank provided Mr S with his recent transaction history. Mr S noticed some unexplained spending on the account. The transactions he didn't recognise were made up of a number of card payments in D, followed by subsequent cash withdrawals and card purchases in other establishments in Benidorm. All in all, this spending totalled around 16,000 euros spent over the course of around 24 hours. This began from when Mr S visited D and spanned across the course of the next day, i.e. after he'd become aware on the morning of 15 July 2019 that his card was missing.

When he first found out about this spending, Mr S told Northern Bank that he wasn't entirely sure which transactions he needed to dispute. But over the following few weeks, Mr S claimed that he should not be held liable for anything other than a few card payments in D, up to a maximum of around £350. He explained that he hadn't consented to any of the other payments and cash withdrawals and maintained that he had nothing to do with the expenditure – so he must have been scammed.

When Northern Bank questioned him further on what had happened, Mr S accepted that he'd couldn't accurately recall the whole evening of 14 July 2019, due to feeling significantly intoxicated that night. He said he was also still feeling the effects of this the following morning. Even so, he was sure that he'd tried to raise the matter the next day by entering bank branches nearby and he also registered a report in the local Police station too. Mr S submitted that his card and PIN number must have both been intercepted without him realising. As he saw it, this was plausible given that he was asked by D's staff to enter both into a portable card machine on multiple occasions. Mr S wasn't sure how the transactions happened outside of D – but, in the end, he concluded that he must have had his card stolen at some point that night.

After investigating the disputed transactions Northern Bank declined to refund them. Among other reasons, it said that it couldn't reasonably be expected to have blocked the spending or questioned it before it went ahead. The bank drew similarities to recent expenditure that Mr S made himself while on holiday and, overall, thought there were fair grounds for not intervening. What's more, Northern Bank said that Mr S had a duty to make it aware of the loss of his card without undue delay. And had he done so when he first became aware on the morning of 15 July 2019, the subsequent transactions could've been avoided entirely, as the card could have been immediately blocked.

Unhappy with this, Mr S asked our service to decide the complaint. One of our investigators looked into it and had a number of conversations with him about what happened. Sadly, Mr S then passed away in January 2021.

After concluding her investigation, our investigator was satisfied Mr S had been the victim of a scam, with there being a plausible explanation for the interception of his card and PIN, together with reliable evidence that D was renowned for facilitating this type of fraud. She took into consideration the vulnerabilities that Mr S had in respect of his mental health. Overall, her recommendation was that Northern Bank should refund a number of the disputed transactions and offer £100 compensation.

Northern Bank didn't agree and made a number of counter-arguments:

- It contested the evidence about D, particularly that it was known to facilitate this exact type of scam. The reason being, the date of the online articles and media coverage referenced were actually reported in November 2018, regarding a different nightclub operating in Benidorm. This establishment was known for criminal activity – but was in fact shutdown some months prior to the disputed transactions that took place in D during July 2019. Therefore, D cannot fairly be considered in the same light.
- There are some concerning discrepancies in Mr S' version of events.
- The bank raised that the disputed spending was not typical of fraudulent behaviour. There are noticeable gaps between certain transactions, yet there was money available to spend on the card. In Northern Bank's view, it's illogical for someone who had the means to use the card to wait for such long periods between the transactions.
- It's not in question that Mr S intended to spend money in D. The nature of this nightclub and the fact that he was intoxicated needs to be considered.

- Finally, the bank reiterated that Mr S had a duty to inform it of the loss and/or theft of his card without undue delay.
- Overall, its position is that it's speculative that the transactions were made without Mr S' authority. Therefore, Northern Bank maintains that it should not be held liable for refunding any the disputed transactions.

Our investigator reviewed Northern Bank's response but remained of the view that the complaint should be upheld. Although, she's since explained to the parties that we're unable to recommend the £100 compensation element, considering our complaint handling rules regarding deceased complainants.

Because Northern Bank is not in agreement with our initial assessment, the complaint has been escalated to me to decide.

Provisional decision

I issued a provisional decision on 6 August 2021. In this, I said:

"I know my intended decision will be disappointing for Mrs S. This is a finely-balanced case and I'd like to assure her that I've duly considered everything that's been provided. Including, the vulnerabilities that her late husband had and described to this service. But on account of the evidence, I'm not currently persuaded that Northern Bank ought to refund the disputed transactions here. I'll explain why.

relevant considerations

It's important to point out that it's not for me to determine exactly what happened on the night of 14 July 2019 nor the following day. Rather, what I need to decide is whether Northern Bank could fairly and reasonably have held Mr S liable for the transactions he said he didn't make during this time.

One of the regulations that is relevant when considering this is the Payment Services Regulations 2017 ('PSRs'). In short, Northern Bank is generally required to refund any unauthorised transactions. There are some exceptions in the regulations – but none I've needed to consider or that have an impact on the decision I intend to make here.

The PSRs also say that a person to whom a card has been issued must use it in accordance with the terms and conditions governing its issue and use. And according to the relevant section of the regulations, Mr S had a duty to notify Northern Bank without undue delay on becoming aware of the loss, theft, misappropriation or unauthorised use of his card.

The credit facility provided by Northern Bank was used for some of the transactions in question here, i.e. once the credit balance Mr S put on the card had been used up. Where such credit is involved, the PSRs make provision for the Consumer Credit Act 1974 (CCA) to apply.

In summary, the CCA says Mr S wouldn't be responsible for any loss arising from the use of his credit card facility by another person not acting, or to be treated as acting, as his agent. But the provisions in the CCA didn't stop Mr S from being made liable to any extent for the loss to Northern Bank from the use of the credit card by a person who had it with his consent.

So, in simpler terms, the case turns on whether the transactions were 'authorised'. I've therefore focused on this key point in my decision.

were the disputed transactions authorised?

For a transaction to be authorised it must first be authenticated. We know that both the card and PIN were needed in order for all of the disputed transactions to go ahead as they did. It's common ground that it was Mr S' card and correct PIN that were used as authentication. And the technical evidence presented by Northern Bank satisfies me that the transactions were all correctly authenticated using these security credentials.

That on its own is not enough to enable Northern Bank to hold Mr S liable. However, Northern Bank could have held him liable if the evidence suggests that it's more likely than not that he consented to the transactions being made. This is the case whether he made them himself or authorised another to do so.

Before Mr S passed away, he made a number of submissions to our service. I'm satisfied that he was given ample opportunity to present his case and I've thought carefully about whether he consented to the transactions.

Turning first to the card activity on the night Mr S spent in D. Mr S always maintained that certain staff members at D manipulated him into entering his card and PIN for amounts that went far beyond what he owed. He said they also tricked him into believing that certain transactions hadn't been successful and so he needed to execute the payment again. When in fact, he was unfairly charged multiple times for what should've been the same payment. Hence, why there are a number of card transactions at D that he disputed.

In situations like these, where evidence is incomplete, inconclusive or contradictory, I need to decide a complaint on what I think is more likely than not to have happened in light of all the available evidence and the wider surrounding circumstances.

Upon doing so, I am not currently persuaded that Mr S didn't provide his consent for these transactions to go ahead. I say so for the following reasons:

- 1. It's common ground that Mr S made a significant payment towards the account before travelling to Benidorm, which formed a credit balance. A credit card is not the same as a deposit taking account; its fundamental purpose is for purchases rather than a place to hold a consumer's funds. As I see it, loading the account with a c.£20,000 payment signifies that it was always Mr S' intention to spend an amount in that region – I'm certainly not led to believe that he wished to hold his funds as a credit balance indefinitely. Indeed, Mr S explained that he pre-paid this amount to cover his expenditure while on holiday.*
- 2. Using the card frequently on holiday was something that Mr S had done on at least two different occasions in the months leading up to his trip to Benidorm. I therefore cannot say that spending on it while abroad was unusual or uncharacteristic for him. Although he may have spent more on this holiday than he did previously, the fact that he created a credit balance before leaving for Benidorm indicates that he wanted to have more funds available for this particular trip. And Mr S explained that this card was his sole method of payment while there – he did not bring another card with him.*

3. *Mr S willingly entered D and didn't deny that he opted to use the card to pay for alcohol and other services. The total cost of which was difficult for him to quantify exactly, given the nature of what was being offered at the nightclub. In any case, we know that Mr S was at the establishment at his own choosing, having brought the means to cover the expenditure that ultimately occurred there.*
4. *On his own account of what happened, Mr S appreciated he was spending money for services rendered. He input his card and PIN into the card machine while at D. By doing so, he followed the agreed procedure to execute the transactions that took place, in accordance with the terms and conditions governing the card's issue and use.*
5. *Although Mr S claimed that the staff at D manipulated the amounts he was agreeing to spend, by his own admission, he became very intoxicated to the extent that he was unable to remember much of what happened that night. With respect, I cannot rule out that he consented to the spending at the time but simply could not remember afterwards.*
6. *Besides, if Mr S was tricked into making a payment, or deceived about the amount he was paying, that doesn't necessarily make the payment transaction unauthorised.*
7. *I have to bear in mind that it was Mr S' discretion how to spend his money. He was entitled to do so without the bank second-guessing or intervening if the transactions were for services that he had chosen to pay for. Under these circumstances, I cannot safely conclude that an effective warning from the bank would've made a difference; the evidence suggests Mr S was at D and spending on his own accord.*
8. *Northern Bank should have paid due regard to certain vulnerabilities Mr S had concerning his mental health. However, I'm satisfied the bank were only made aware of this in 2020, some months after these transactions had already taken place. I therefore do not find it fair to expect this to have had a bearing on the bank's decision making at the material time.*
9. *Finally, I cannot safely conclude that D was renowned for facilitating this type of scam (or any other type of fraud for that matter). As I understand it, the press reports and online articles referenced were in connection to a different nightclub that preceded D's operation.*

I've gone on to consider the subsequent card activity that took place. The key point with these cash withdrawals and card payments is that, unlike the spending in D, Mr S says he was not present with his card when these transactions occurred. So, in order to decide that they should be refunded, I need to be persuaded that a third-party (or third parties) fraudulently intercepted both his card and PIN.

Together with the points I've made above, the reasons that follow leave me unconvinced that this is what happened:

10. *Mr S conceded that his memory was hazy in part, which is why he didn't specify which transactions he wanted to dispute immediately after Northern Bank presented him with the account's recent activity. While I can appreciate that his recollection may not have been entirely clear, I have to bear in mind that the discrepancies in Mr S' story take away from the credibility of his submission.*

11. *For example, during a call shared with our investigator, Mr S appeared confident that he left D with the card still in his possession. He remembered specifically that he 'had it in his wallet' when leaving the nightclub.*
12. *On that basis, I can't see a persuasive explanation for how a third-party was able to fraudulently use the card without his consent. Because, even if Mr S' PIN had been compromised, the disputed transactions simply could not have been executed without the presence of the card itself. It's unclear how the card was with Mr S – yet, he did not consent to these cash withdrawals and card payments taking place.*
13. *On the other hand, Mr S also told our service that he thought his card was taken from him while in D – so he was without it when he left there. He believed that it was stolen from him once a third-party had managed to intercept his PIN, perhaps through observing him enter it into the card machine.*
14. *I accept that this was possible. However, I reach my decision not on mere possibilities – but rather based on what I find most probable. And, on balance, I am not persuaded that this is what happened. I say so because, the overall behaviour here does not match what I'd typically expect of fraud. On the contrary, I find it unusual and unlikely for a fraudster to have intercepted Mr S' card and PIN to then use it in the way that it was.*
15. *In particular, the timing of the transactions does not convince me that a third-party was fraudulently spending on the card. I find it reasonable to conclude that a fraudster would make the most of having access to the card and PIN in the shortest possible amount of time, in order to maximise their gain before the fraud was identified and/or the card blocked. But here, there are gaps between some transactions of six and even nine hours on certain occasions. In other words, there was funds available to spend, yet no payments or withdrawals were made for several hours or more.*
16. *The common factor in what Mr S' described was that he last remembered having his card while at D, which is also where he maintained that the fraudulent activity began. If I were to accept that his card was in fact stolen, the thief would likely be aware that it would only be a matter of time before the theft was reported to the authorities. I cannot see a compelling reason why a perpetrator would jeopardise being able to extract as much of the available balance as possible by leaving long intervals between the transactions. Especially, as some of the spending took place almost a full 24 hours after Mr S claims it was first stolen – it does not make sense to me why a fraudster would take such an undue risk.*
17. *What's more, Mrs S' whereabouts and actions after he left D have not been corroborated with documentary evidence. For instance, Mr S claimed to have raised the matter with branches of Northern Bank on 15 July 2019 once aware that his card had been stolen. Yet, there is no record of this and the bank has evidenced that it held no such branches in Benidorm at the time – so this cannot be true regardless. Mr S was also unable to produce a crime reference number or incident report from the Police in Benidorm, despite explaining that he raised the matter with the local Police station.*

18. *I must follow the evidence and, ultimately, Mr S did not persuasively prove his case having been given a fair chance to do so. After all, I am faced with a conflicting version of events from Mr S. For me to accept his side of things and uphold the complaint, I would need to place considerable evidential weight on his testimony. But in fairness, his statement is slightly vague and self-contradictory regarding what are critical elements to a case of this kind. I therefore cannot safely conclude that the activity in question was executed without his consent based on his testimony alone.*

19. *This is not, however, the same as dismissing Mr S' statement – and I hope Mrs S can appreciate that it would not be reasonable, nor fair of me to uphold this complaint based solely on Mr S' testimony if on balance the evidence suggests otherwise.*

notification without undue delay

Finally, I turn to the obligation Mr S had to report the loss and/or theft of his card without undue delay. I see no compelling reason why, upon being made aware of the theft of the card, the bank could not have blocked it from further use. Consequently, I must consider that if Mr S had notified Northern Bank sooner, it could have prevented the majority (if not all) of the transactions that took place on 15 July 2019 and onwards.

Mr S claims that he was able to raise the matter with the authorities and/or bank staff. So, I must assume that he was aware of the need to report what had happened and appears to have been able to express his concerns. As I understand it, he still had possession of his mobile phone. So, notwithstanding any attempt in branch or the local Police station, it's unclear to me why he could not have contacted Northern Bank following a quick search for its contact number on the internet. As a large identifiable bank, it seems highly likely that such a phone number could be found online or through other reasonable endeavours. We also know that Mr S saw out the rest of his stay at his hotel having returned there on 15 July 2019. And it seems plausible that he could have asked for assistance from hotel staff to find some way to get in touch with his bank.

Therefore, although I realise the ordeal must have been upsetting for him, I find it reasonable to have expected Mr S to have reported that his card was missing shortly after he became aware. So, even putting aside the considerations surrounding whether the transactions were authorised, I'm satisfied that some of the loss here could have been avoided, but for Mr S raising things sooner in accordance with his obligations under the PSRs.

To that end, unless my conclusions are persuasively rebutted on the grounds of both authorisation and the duty Mr S had under the relevant regulations, I will not be requiring Northern Bank to refund the disputed transactions here."

Responses to my provisional decision

Northern Bank accepts my provisional findings and had nothing further to add.

Mrs S does not agree. She reiterated that the late Mr S did not authorise these transactions and the loss of the money was a cause of great upset for him before he died.

As Mrs S sees it, there were large amounts leaving the account at high speed. Therefore, Northern Bank ought to have done more to intervene, considering how uncharacteristic this spending was for the account.

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 thank Mrs S for her response and have duly reviewed her comments, along with reconsidering all of the evidence and submissions from each of the parties.

As I explained, I would need to see persuasive evidence to rebut my provisional findings both on the grounds of authorisation and the duty Mr S had under the relevant regulations.

Ultimately, there has been no new evidence or arguments presented that are materially different from that of what I've considered before. Mrs S' response reiterates the merits of the case that I had already thought about carefully. Therefore, although I recognise how strongly Mrs S feels about the matter of whether this was in fact a scam, my review of what's before me leads me to the same overall conclusions as set out in my provisional decision.

I'm sorry to dissappoint Mrs S on what I can appreciate is a highly sensitive and upsetting subject for her and her family. However, I remain of the opinion that it would not be fair or reasonable of me to require Nothern Bank to refund the disputed transactions here.

My final decision

For the reasons given above and before, my final decision is that I do not uphold this complaint nor make any award against Northern Bank Limited (trading as Danske Bank).

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr S to accept or reject my decision before 17 September 2021.

Matthew Belcher
Ombudsman