

The complaint

Mr A complains that MBNA Limited held him liable for transactions that he says he didn't make, and unfairly registered a marker with the fraud prevention agency CIFAS. He'd like the transactions refunded and the CIFAS marker removed.

What happened

Mr A had a credit card account with MBNA. In December 2018 he let MBNA know he didn't recognise a number of transactions on his account, using his card (Card 1). These included payments made using contactless, chip and PIN, and using online details. MBNA refunded the transactions and issued Mr A with a new card (Card 2).

Shortly after Mr A contacted MBNA to say he didn't recognise another set of transactions, to a hotel, on the second card. He said he'd moved address before Card 2 was sent, so hadn't received it.

This time MBNA declined to refund these transactions, as they found that several bookings had been made using Mr A's name and contact details. They also re-reviewed the transactions on Card 1. After investigation they found that the hotel booking, as well as a booking for a haircut, were made using Mr A's contact details. They also decided Mr A's story had been inconsistent. They felt they couldn't safely conclude the transactions were carried out without Mr A's knowledge or consent. They took the decision to hold Mr A liable for all the transactions, including those they'd previously refunded.

MBNA also recorded a marker against him with the fraud prevention agency CIFAS, because they felt his claims were a "misuse of facility".

Mr A complained to MBNA about the decision to hold him liable for the transactions. They issued their final response in February 2019, reaffirming why they'd decided to hold Mr A liable for the transactions. The response gave Mr A six months to refer the complaint to our service, in line with the rules our service operates. It said if Mr A didn't refer the complaint in time, they would not consent to our service looking into the complaint. Mr A responded to MBNA, but they referred him back to the final response letter.

In 2020 Mr A discovered the marker MBNA had recorded with CIFAS and complained to MBNA. The bank issued their response in January 2020 saying that as they believe Mr A had made false claims, then the marker had been added correctly and in-line with their processes.

Unhappy with this answer Mr A referred the complaint to our service. One of our investigators looked into what happened. Firstly, she said that Mr A had referred his complaint about the decision to hold him liable for the transactions to our service outside the six month time limit set out by our rules. But she said we could consider the complaint about the CIFAS marker as this was referred in time. This was accepted by both parties.

The investigator felt that MBNA hadn't done anything wrong by recording the CIFAS marker. She said the bar for recording a marker with CIFAS was high but based on the information available there was enough basis for MBNA to record the marker.

Mr A disagreed and asked that the case be looked at by an ombudsman. Through a representative he raised additional points, saying that MBNA's recording of the CIFAS marker was based on gathering evidence to support their assumptions – about Mr A's income, and his location when transactions were being made; and the way a typical fraudster may operate.

The investigator put this to MBNA, but they didn't feel this changed anything. They felt that the majority of the transactions were made using the physical cards, and there didn't seem to be a reasonable explanation of how a fraudster would get hold of both cards, as well as Mr A's PIN. A fraudster would also have needed to access Mr A's computer on at least two occasions. They couldn't see a reason a fraudster would use Mr A's name and contact details when making bookings. They felt Mr A's testimony hadn't been consistent. So, they felt they hadn't been unfair when adding the CIFAS marker.

As no agreement could be reached, the case has been passed to me to decide. Having reviewed the evidence I agreed with the outcome the investigator had reached, but wanted to expand upon the reasoning and give both parties a chance to respond. I issued my provisional decision, which said:

For clarity's sake, it has been accepted by both parties that Mr A didn't refer his complaint about the decision to hold him liable for the transactions within the six months' time limit set out in the rules that govern our service – the response was sent on 15 February 2019, so Mr A would have needed to contact us about this before 15 August 2019. But the first contact we received about these transactions wasn't until December 2019.

As this was referred out of time, and I don't see there are any exceptional circumstances that would have prevented Mr A from contacting our service, I'm satisfied that our service doesn't have the power to consider this complaint. Therefore, this decision doesn't consider MBNA's original decision to hold Mr A liable for the transactions.

However, the complaint about the CIFAS marker was referred to our service on time. And I recognise that at the heart of this complaint is the same dispute over whether the transactions in dispute were authorised. So, part of my consideration will have to be what I think more likely than not happened to Mr A's cards.

Both parties seem to be aware of the principles that CIFAS set out for reporting a marker to them, so I don't need to repeat them in full here. In summary there needs to be clear evidence that fraud or financial crime either took place or was attempted. The evidence needs to be clear and rigorous and go beyond simple suspicion.

In the context of Mr A's complaint, MBNA have applied the marker because they believe Mr A knowingly made false claims of fraud on his credit cards. If this is the case, then this would ordinarily be enough for a CIFAS marker to be recorded. The key question for me to consider is whether MBNA have enough evidence to show that it's more likely than not Mr A carried out the transactions himself or allowed someone else to do so.

I don't see how it would be possible for someone unknown to Mr A to have carried out the transactions in dispute. A booking was made using the details from Card 1 but paid for using the physical Card 2. This shows us that whoever was making the transactions was in possession of both cards.

It would be incredibly unlikely that a person unknown to Mr A would be able to steal Card 1 without Mr A noticing, and then know to intercept and use Card 2. We also know the bookings were made using Mr A's real contact details – which a thief wouldn't have been able to find out from a credit card alone.

Considering all the evidence available leads me to the conclusion that it was either Mr A carrying out the transactions, or someone acting with his authorisation. There are a number of factors that lead me to this.

I can see from the authorisation records that several transactions authorised with the chip being read and the PIN being entered – across both Card 1 and Card 2. There doesn't seem to be a clear way someone other than Mr A would come to know the PIN. There's no record of PIN reminders being sent. And there's no indication that Mr A had allowed anyone else to use the card and PIN previously. The last undisputed use of Card 1 by Mr A was several months beforehand – so it would seem unlikely that someone would have observed Mr A enter his PIN, then wait so long to steal the card. So, this suggests to me it was likely Mr A making these transactions.

There are also no attempts to use either card after Mr A reported them missing, which suggests whoever had the card knew they would not work anymore.

Having reviewed the call recordings between Mr and MBNA I note that when Mr A calls to report the transaction on Card 2, to the hotel, he confirms he has received the replacement card and has it on him. When MBNA inform him that they've contacted the hotel and the guests are currently staying there, he says he has to make some calls. This seems like an unusual reaction if he was completely unaware of any use of his card.

It's only two days later he calls MBNA to say he hadn't received the card, and he was thinking of a different credit card he had. But if you had been the victim of a card theft, I think it likely you would be reasonably aware of that particular account and know there is a replacement card on the way. There is inconsistency in what Mr A has told MBNA.

It's also in this call that he tells MBNA he has moved address. But I also note that the address he says he has left, and where Card 2 was sent, is the same address Mr A provided to our service when he set up his complaint. This would strongly suggest he still has access to this address and could have received the card there.

I've considered what Mr A, through his representatives, has said about his location when transactions were made, but this still wouldn't adequately explain how someone else had access to his card and PIN. I also acknowledge what he's said about MBNA's assumptions about his financial standing, and the actions of a typical fraudster. But these assumptions haven't played a part in me drawing my conclusions.

Based on the evidence available, I think it more likely than not the transactions in dispute were carried out either by Mr A or someone acting with his authorisation. I'm satisfied then that when he reported them as unauthorised to MBNA, he would have been aware this wasn't correct. On that basis I think MBNA have enough information to meet the burden of proof to record a misuse of facility marker with CIFAS.

I said I wasn't minded to direct MBNA to do anything further. MBNA didn't respond or provide anything further. Mr A, through his representatives, responded to say, in summary:

- *That it didn't appear the points that were made on Mr A's behalf were considered, or that MBNA's position was fully scrutinised.*

- There was no reference to MBNA being asked to provide evidence of when the cards were sent out, and when they were activated.
- The decision erroneously creates a lower standard of proof for MBNA to record a CIFAS marker – the civil standard of more likely than not. When the standard for recording a marker with CIFAS is higher, in that the member must have evidence strong enough that they could confidently report it to the police.
- MBNA's position is undermined by the fact they initially accepted Mr A's account around the transaction on Card 1.

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.

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Having reviewed everything, I don't see that MBNA have been unfair in registering a marker against Mr A with CIFAS.

I've read and considered all of submissions on Mr A's behalf regarding his complaint, but I'll concentrate on what I think is relevant. If I don't comment on a specific point, it's not because I've failed to take it on board and think about it, but because I don't think I need to comment on it in order to reach what I think it is the fair and reasonable outcome.

Neither party has objected to my finding on our jurisdiction, so this decision is solely about the CIFAS marker, and whether there is clear evidence that Mr A was involved in fraud or financial crime. In this complaint this is whether Mr A knowingly made false claims of fraud on his credit card.

I'm still satisfied it's likely Mr A either made the transactions himself or allowed someone else to do so. As Mr A has said in response to my provisional decision the standard for recording a marker with CIFAS is higher than the civil standard of "more likely than not", which was referenced in the provisional decision. It is that the evidence should be clear and rigorous enough that the CIFAS member could confidently report the matter to the police.

I accept the wording in the provisional decision was unclear on this point. To clarify, I'm satisfied that MBNA hold enough information to meet the standards set out by CIFAS – that when Mr A reported the transactions are fraudulent, he did so in the knowledge that they weren't. There are a number of reasons that lead me to this conclusion:

- We know whoever carried out the transactions had possession of both cards – bookings made using the details of Card 1 were then paid for using Card 2. This means it's incredibly unlikely to be a random thief, or someone unknown to Mr A.
- There isn't a reasonable explanation of how somebody could have got hold of both Card 1 and Card 2 and come to have known Mr A's PIN. There were no PIN reminders sent out when Card 2 was ordered. And the previous legitimate use of the PIN was months before the disputed transactions, so it's incredibly unlikely someone would oversee his PIN and then wait months to steal the card. Mr A hasn't commented on this point or given any indication that he had given his card and PIN to anyone else to use.
- Card 2 was sent to an address Mr A told MBNA he no longer had access to, so couldn't have received the card. But this is the correspondence address he gave to our service when asking us to look into his complaint. This suggests to me he did still

have access to that address. And in his initial reporting call for the disputes on Card 2 Mr A confirms he'd received the card and had it on him. He only later changes this to say he'd never received it and hasn't offered an explanation on this point.

- Neither card was used, or attempted to be used, after Mr A reported them missing. This strongly suggests whoever had them knew they'd been cancelled and wouldn't work – which in this case can only be Mr A or someone close to him.

The response to the provisional decision on behalf of Mr A hasn't changed my thinking on any of these points. In the absence of any other plausible explanation, I'm satisfied that the evidence MBNA hold is clear, relevant and rigorous enough to meet the CIFAS standard of proof. So, I don't consider it unreasonable for MBNA to record a marker against Mr A with CIFAS.

Mr A's representatives have asked why no evidence of the activation of the cards has been provided by MBNA. MBNA have commented that Card 2 would not have required activation as they didn't know of any additional risk factors such as a shared mailbox. In any case, whether the card was activated would not have any bearing on the outcome, as the crux of the issue is whether the transactions were made by Mr A, or someone he had authorised to do so. And for the reasons explained above, this is the only plausible explanation of how they were made.

I also don't consider that MBNA changed their position on the disputed transaction on Card 1 to be unfair or unreasonable. Financial institutions are entitled to review their decisions, especially after new evidence becomes available to them. I can't see this as particularly unusual or weakens MBNA's position. Having reviewed the evidence, I've reached broadly the same conclusions they did.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 5 August 2022.

Thom Bennett
Ombudsman