

The complaint

Mrs M complains that HSBC UK Bank Plc has not refunded payments she says she did not make.

What happened

Mrs M's son was staying with her, and didn't have a mobile phone of his own, so she lent her phone to him so he could make a phone call. Mrs M asked her son to give the phone back to her as soon as he was finished with his call but as this was late in the evening she fell asleep, and so didn't get her phone back until the next day.

At that point she discovered that her son had made a series of payments from her HSBC account using Apple Pay on her phone to an online gambling company. The total value of the disputed payments is £2750. Mrs M immediately raised this with HSBC and asked for a refund, as she said she had not authorised the payments.

HSBC did not agree to refund the payments, it said this was a civil matter as the payments had been made by someone known to Mrs M, and because Mrs M had willingly given her phone to her son to use. Mrs M was unhappy with HSBC's response and asked us to look into her complaint.

One of our investigators looked at what had happened, she felt that Mrs M had not consented to the payments as she had given her son her phone only to make a phone call, without realising that he might be able to access her Apple Pay facility. So the investigator felt the payments had not been authorised by Mrs M and recommended that HSBC refund them, plus 8% interest.

HSBC disagreed, and has now provided evidence from the merchant which shows that an account was set up in Mrs M's name, using her phone number. So HSBC maintains that she did authorise the payments or allow them to be made.

As no agreement has been reached, this case has now been referred to me for a decision.

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've come to the same outcome as our investigator, and for largely the same reasons.

The relevant law here is the Payment Services Regulations 2017, and broadly speaking Mrs M is responsible for any payments that she has authorised (either by making them herself or allowing someone else to) and she isn't responsible for unauthorised payments.

Mrs M has explained that she did not give her son permission to make the payments to the gambling company. However, that doesn't automatically mean that those transactions are unauthorised and that they should be refunded. It's possible for Mrs M to give someone else

authority to make transactions on her behalf – and it follows that Mrs M would then be responsible for them. This is the case even if this person carried out more transactions than Mrs M agreed to or expected and is what's known as apparent authority.

However, apparent authority can't be given negligently. And I'm not persuaded Mrs M deliberately gave her son her card details or access to her Apple Pay facility. Mrs M has been consistent in her explanation that she gave her phone to her son for the sole purpose of making a phone call. She didn't use Apple Pay often – as evidenced by her bank statements – and so hadn't appreciated that he could use her phone in the way he did. I'm satisfied that the payments were made through deception, what Mrs M's son ultimately used her phone for is totally different to what he said he would be doing.

So, with this in mind, I don't agree that Mrs M authorised these transactions. I note that we wouldn't tell HSBC to refund unauthorised transactions if we considered Mrs M had failed with intent or gross negligence to keep her details safe. But I've already set out above why I don't think Mrs M acted intentionally here and the same rationale applies to failing to keep her card details safe with intent. For gross negligence to apply, Mrs M would need to have shown a very significant degree of carelessness. And I don't think that is the case here, Mrs M did not regularly use her Apple Pay facility – and in any case thought that face recognition was required to use it – and so was not consciously aware of the possibility that her phone could be used by a third party to make payments in this way. And with that being the case, I can't reasonably say Mrs M acted with gross negligence.

I note HSBC's recent submission of evidence from the merchant, which shows that an account was set up with Mrs M's name, personal details and phone number. And a question has been raised as to why Mrs M's son would use her details, and specifically her phone number, to open the account. But as already noted, he did not have a phone of his own, and was in possession of her phone at the time, so it seems entirely plausible that he would use her phone number to set up an account, and would use her details in general given that the card he was using to fund the account was in her name. And, as her son, he would have been well versed with her personal details for setting up the account. I also note that the email address on the account does seem to be in Mrs E's son's name. So nothing in the latest submission from HSBC has changed my findings as set out above.

With all this in mind, it follows then that as I don't consider Mrs M to have authorised the payments it disputes, or to have failed with intent or gross negligence to keep her card details safe, HSBC is liable to refund the disputed payments to Mrs M.

Putting things right

Having thought about everything, I think that it would be fair and reasonable in all the circumstances of Mrs M's complaint for HSBC to put things right by:

- Refunding the disputed transactions, and restoring the account to the position it would have been in if the transactions had not been made
- Paying 8% simple interest on that refund (calculated from the date the disputed payments were made until the date of settlement)

My final decision

For the reasons I've explained, I uphold this complaint, and direct HSBC UK Bank Plc to put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or

reject my decision before 22 September 2022.

Sophie Mitchell
Ombudsman