

The complaint

Ms K is unhappy Caxton Payments Limited won't refund money she lost as a result of a payment she didn't authorise.

What happened

It is undisputed that, in June 2021, Ms K's email account was accessed by a third party. That third party was able to reset her Caxton account password and instruct a number of payments from her account. Only one of those payments has not been returned to Ms K – a payment of £9,850.

The following day Ms K noticed an email from Caxton relating to the fraudulent instruction. She contacted Caxton and the matter came to light.

It said that it wasn't responsible for her loss because it had acted in line with its terms and conditions and its security systems had not been compromised.

Ms K argued that Caxton didn't provide adequate protection to its clients as there was no additional security check on the payments. She also pointed out that the fraudulent instructions ran contrary to her stated intentions for the money, something Caxton was fully aware of.

Ms K referred the matter to our service and one of our investigators upheld it. They thought that under the relevant regulations Caxton, rather than Ms K, was responsible for the payment. So, they recommended that it refunded Ms K in full.

Caxton didn't agree. It maintained that its terms and conditions meant it wasn't responsible for the loss. Ms K said that she'd like a final decision to be clear that Caxton had a responsibility to keep her funds safe and it failed to do this by not listening to her intentions, not having the correct protocols in place and not noticing that the fraudulent instruction did not match her normal way of making a payment. She was also disappointed with the way in which Caxton handled her claim and felt it was very dismissive.

As no agreement could be reached, the case was passed to me for a final 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.

Under the relevant regulations, the Payment Services Regulations 2017, Ms K is only responsible for transactions she's authorised.

There's no dispute that Ms K didn't ask Caxton to make the transaction. But Caxton seeks to rely on clause 5.4 of its terms and conditions to argue that any instruction it receives from a user's account can be treated as authorised. That clause demands that:

"The Client shall keep all passwords and authorisations issued to it by CFX confidential and secure and CFX shall be entitled to rely on all instructions or Orders received by it using those passwords and authorisations as if they were received from the Client, without conducting any further checks as to the identity of the person making the instruction or Order."

A transaction can still be considered authorised if an account holder has given authority to another person (intentionally or otherwise) to act on their behalf. But a business cannot treat any instruction as authorised merely because it has been authenticated using the account holder's personalised security information. It also needs to demonstrate that the person instructing the payment either was, or had the authority of, the payment service user (whether that authority was apparent or actual).

In this case, Ms K didn't give any authority to another person (intentionally or otherwise). Her email account was accessed fraudulently and her Caxton password was reset.

So, I'm satisfied the transaction in dispute wasn't authorised by Ms K and that means, as a starting point, Caxton is responsible for the loss.

Under the PSR 2017, an account holder can be held responsible for an unauthorised payment if they've failed with intent or gross negligence to comply with Regulation 72 or the terms of their account. There's no definitive definition of gross negligence but it suggests a very significant degree of carelessness and a serious disregard to an obvious risk.

Reg. 72 PSR 2017 sets out that:

- (1) A payment service user to whom a payment instrument has been issued must—*
 - (a) use the payment instrument in accordance with the terms and conditions governing its issue and use; and*
 - (b) notify the payment service provider in the agreed manner and without undue delay on becoming aware of the loss, theft, misappropriation or unauthorised use of the payment instrument.*
- (2) Paragraph (1)(a) applies only in relation to terms and conditions that are objective, non-discriminatory and proportionate.*
- (3) The payment service user must take all reasonable steps to keep safe personalised security credentials relating to a payment instrument or an account information service.*

In addition to the clause I've already set out, Caxton also rely on clause 11.3 of their terms. That clause explains that:

"You must maintain up to date anti-virus protection on the device from which You access Your Caxton account. You must also remain vigilant and check that You are accessing only the proper Caxton website at all times."

I've already explained that Ms K did not intentionally share any sensitive account information. It's clear that the fraudster was able to access her account by resetting her password. So, I'm satisfied that her loss was not as a result of an intentional disregard of the terms or her obligations in Reg. 72. I've gone on to consider whether Ms K failed with gross negligence.

It isn't enough for Caxton to show that either clause was breached, it needs to show that any breach was grossly negligent. But, in any case, there's no evidence that Ms K didn't have up to date anti-virus protection and, as far as I know, such software wouldn't necessarily prevent a third-party gaining access to an email account. So, Caxton cannot rely on clause 11.3 to decline her claim.

In relation to clause 5.4, it's undisputed that the third party obtained access to Ms K's account by resetting her Caxton password. There is nothing to suggest Ms K failed to keep her password secure. Whether Ms K's email account password was also kept secure is unknown to me, but also not relevant. It wasn't 'issued' to her by Caxton and, in these circumstances, would not constitute a 'payment instrument' under the PSR 2017 (as it was not used, and seemingly could not be used, to instruct the payment).

So, Caxton haven't satisfied me that its terms were breached and I certainly haven't seen anything to suggest they were breached with intent or gross negligence. It follows that Caxton are responsible for Ms K's loss.

Turning to Ms K's points, I understand why she's unhappy that the transaction was ever allowed to proceed. It isn't my role to instruct Caxton as to what security procedures it ought to have in place. But I can consider whether a financial business ought to have identified that an instruction it received was fraudulent. I agree that the fraudulent instruction which seemed to be contrary to Ms K's intention for the money and the fact the payment was instructed in a way that wasn't typical for her account, might have caused some concern but I'm also sympathetic to the arguments raised by Caxton – that it is a large business dealing with many clients and instructions. In any case, such a finding makes no difference to the outcome of this case.

Finally, turning to interest, Ms K's intention was to invest the money in stocks and shares. Understandably, she's not able to demonstrate how her investment would have performed over the period since her loss. Taking that into account, our investigator recommended interest at the Bank of England's published rate for one year fixed-rate bonds for the month of June 2021. That rate is 0.24%. As Ms K has accepted this and it's not possible for me to accurately calculate how any investments might have performed, I think this award of interest is fair.

My final decision

I uphold this complaint and instruct Caxton Payments Limited to pay Ms K:

- £9,850
- Simple interest per annum on that amount at the rate of 0.24% from the date of loss to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms K to accept or reject my decision before 23 February 2023.

Rich Drury
Ombudsman