

## **The complaint**

A company, which I'll refer to as C, complains that Advanced Payment Solutions Limited (trading as Cashplus Bank) won't refund payments it didn't make.

Mr D, who is a director of C, brings the complaint on C's behalf.

## **What happened**

The details of this complaint are well known to both parties, so I won't repeat them again here. The facts are not in dispute, so I'll focus on giving the reasons for my 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 reached the same outcome as our investigator for these reasons:

- Cashplus hasn't disputed this concerns unauthorised payments. However, in line with the Payment Services Regulations 2017, it refused to refund them because it asserts Mr D failed with gross negligence to comply with the terms of the account and keep C's personalised security details safe.
- To decide whether Cashplus has shown this, I've considered the circumstances of what happened.
- Mr D received a call from someone who claimed to be from Cashplus. He said they recalled sensitive information about C, like its card details. And he was told he'd need to relay one-time passcodes (OTPs) to stop fraudulent transactions.
- Given the information they knew about C, I can see how he trusted the caller was genuine. And in light of the situation they presented, I can understand how Mr D became panicked and shared the OTPs without properly taking in entirety of the messages.
- I've considered Cashplus's point that, given the messages were five minutes apart, there was time to read them properly. Mr D has explained how he was put under pressure to share the OTP as soon as it came through. And given he believed he was talking with Cashplus and messages appeared from Cashplus when he was told to expect them, I can see how he trusted what he'd been told to do.
- I can also understand how Mr D didn't look back on the first message afterwards. Indeed, I doubt most people would when they believed it had served its intended purpose.
- It follows that I don't think he seriously disregarded an obvious risk in the circumstances. And taking everything into account, I'm not persuaded that Cashplus

has shown Mr D failed with gross negligence.

- Cashplus submit that to not hold Mr D liable for sharing OTPs negates a purpose behind two factor authentication (2FA) – to stop fraud. It says that most people wouldn't share OTPs, so those that do are grossly negligent.
- 2FA is indeed a mechanism to better protect against fraud. Afterall, without it, fraudsters could've simply used Mr D's stolen card details to make payments. But I don't see how not holding Mr D liable takes away from this better protection. And I don't think it follows that all payments made using 2FA demonstrate gross negligence.
- Indeed, regulation 75 of the PSRs states that the recorded use of a payment instrument (which would include 2FA in this case) isn't enough to show gross negligence.
- And the FCA, in its guidance on its approach under the PSRs explains that gross negligence *"must be assessed on its merits to ascertain whether the customer has acted with "gross negligence". In line with the recitals to PSD2, we interpret "gross negligence" to be a higher standard than the standard of negligence under common law. The customer needs to have shown a very significant degree of carelessness."*
- It follows that sharing an OTP isn't enough to show gross negligence – it's got to be assessed against all the circumstances of what happened. Here, Mr D was duped into sharing two OTPs when he was cleverly and plausibly tricked into believing he was talking with his genuine bank, and they were needed to stop fraudulent transactions. In these circumstances, I've not been persuaded that he acted with a very significant degree of carelessness.
- Cashplus also submit that our approach is open to abuse, as all customers can claim refunds for payments by simply stating they were coerced into revealing OTPs. My role is to decide what's a fair outcome to Mr D's complaint. And Cashplus hasn't submitted evidence to show that Mr D has acted fraudulently here, which it could do in line with PSRs to deny liability for an unauthorised transaction. So this point doesn't change my mind.
- So, while I've considered Cashplus's points carefully, I'm not persuaded it's shown Mr D failed with gross negligence in the circumstances of this case. It follows that, in line with the PSRs, I don't consider C can be fairly held liable for these unauthorised payments and Cashplus needs to put things right – by refunding the unauthorised payments alongside 8% simple interest per year to compensate it for the time it's been out of pocket.

### **My final decision**

For the reasons I've explained, I uphold C's complaint. Advanced Payment Solutions Limited must:

- Pay C the total of the unauthorised payments, less any amount recovered or refunded – I understand this to be £5,705.99.
- Pay 8% simple interest per year on this amount, from the date of the unauthorised payments to the date of settlement (less any tax lawfully deductible).

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

reject my decision before 11 August 2023.

Emma Szkolar  
**Ombudsman**