

The complaint

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

Mr B, who is a director of A, brings the complaint on A'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 an unauthorised payment. However, in line with the Payment Services Regulations 2017, it refused to refund it because it asserts Mr B failed with gross negligence to comply with the terms of the account and keep A's personalised security details safe.
- In saying this, it's pointed out how Mr B shared a one-time passcode (OTP) with a fraudster from a message he received from Cashplus which said: *"XXXXXX is your code to verify the payment [amount] at [merchant] with card ending XXXX"*
- Mr B accepts he shared the code. He's said he did so as he genuinely believed he was speaking with Cashplus, given that the number appeared to belong to his bank, and they knew several pieces of sensitive information about him and A. He explained he focussed on the code in the message without reading the rest, as he was told it was needed to stop a fraudulent transaction.
- Having considered these circumstances, I can see how Mr B trusted the call was genuine – I think lots of people would've done. And while it's arguably careless not to stop and read the message carefully, the test I'm considering is whether Mr B acted with a very significant degree of carelessness to conclude he failed with gross negligence. Here, I can understand how Mr B simply shared the code when he trusted the caller was from his bank, the message came through as he expected, and he thought he was acting to sort out fraud on A's account.
- 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 B failed with gross negligence.
- Cashplus submit that to not hold Mr B liable for sharing an OTP 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 B's stolen card details to make the payment. But I don't see how not holding Mr B 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 B was duped into sharing an OTP when he was cleverly and plausibly tricked into believing he was talking with his genuine bank and it was needed to stop a fraudulent transaction. 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 B's complaint. And Cashplus hasn't submitted evidence to show that Mr B 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 B failed with gross negligence in the circumstances of this case. It follows that, in line with the PSRs, I don't consider A can be fairly held liable for this unauthorised payment and Cashplus needs to put things right – by refunding the unauthorised payment 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 payment, less any amount recovered or refunded – I understand this to be £420.80.
- Pay 8% simple interest per year on this amount, from the date of the unauthorised payment to the date of settlement (less any tax lawfully deductible).

Under the rules of the Financial Ombudsman Service, I'm required to ask A to accept or reject my decision before 11 August 2023.

Emma Szkolar

Ombudsman