

The complaint

Mr S is a sole trader, trading as M. He complains that ClearBank Limited won't refund transactions he didn't make.

ClearBank partners with Tide to provide accounts for its customers. For ease, I've generally referred to ClearBank throughout the decision as it's ultimately responsible for the complaint.

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:

- In line with the Payment Services Regulations 2017 (PSRs), the starting position is that Mr S isn't liable for payments he didn't authorise.
- To determine authorisation, I've considered regulation 67 of the PSRs. This says that a payment is to be regarded as authorised if Mr S consented to the execution of it – and that consent must have been given in the form, and in accordance with the procedure, agreed between ClearBank and Mr S.
- I've reviewed the terms and conditions to establish the agreed form and procedure. These simply say that '*a Tide Cardholder can ... authorise a transaction via Apple Pay*'. Practically speaking, that means that Mr S needed to have used his device, including the relevant security procedures, with the merchant to authorise the payment.
- Here, it's accepted Mr S didn't do this. Instead, it was a fraudster who made the payments after they duped Mr S into sharing a code to finish setting up Apple Pay on their own device.
- ClearBank submit that because Mr S shared the code, he consented to the payments. But I'm not persuaded that his indirect involvement in setting up the means to make a payment is the same as Mr S using the entire agreed form and procedure *to execute a payment transaction*. I think it's akin to saying that activating a card is the same as consenting to all the payments using it, which clearly isn't the case.
- Nor do I think that Mr S could reasonably be described as having given someone permission to go through the form and procedure to make these payments, given that

he was tricked into sharing the code under the belief he was ultimately keeping his account safe.

- It follows that I'm not persuaded he went through the agreed form and procedure to consent to the payments or gave someone else permission to consent to the payments on his behalf. They were, therefore, unauthorised.
- ClearBank can still hold Mr S liable if it can show he failed with gross negligence to comply with the terms of the account and keep his personalised security details safe. While ClearBank hasn't explicitly argued this, it seems some of their submissions allude to this.
- Having considered the circumstances carefully, I'm not persuaded ClearBank has shown that's the case. I'll explain why.
- Mr S received a call from someone pretending to be from Tide, who knew several pieces of his personal and account information. They told him someone was fraudulently using his card and that they needed him to share a code they sent him by text to cancel his card.
- Given his trust in the caller, the urgent situation they presented and how the message appeared when they told him to expect it, I can see how he focused on the code in the message and shared it. I'm not persuaded it meant he fell so far below what a reasonable person would've done that he acted with gross negligence.
- ClearBank submit that Mr S was suspicious as he realised Tide usually message in the app before calling. But it seems his concerns materialised after the call, when he reflected on what happened and was no longer acting in the heat of the moment. Hence why he subsequently blocked his card and called ClearBank to report the call. So this doesn't change my mind.
- ClearBank has also highlighted the warnings it provides to its customers about sharing information. But I can understand how Mr S didn't remember these in the heat of the moment, when he'd been cleverly tricked into trusting the caller was genuine. I don't think it meant he acted with very significant carelessness to conclude he failed with gross negligence.
- Taking this all into account, I don't think ClearBank has shown Mr S failed with gross negligence. So he isn't liable for the disputed payments and ClearBank needs to put things right – by refunding his losses from these unauthorised payments alongside interest to compensate him for the time he's been out of pocket.
- There's a further question here whether ClearBank are also liable for these unauthorised payments as they happened after he told them he received a fraudulent call. It's said it couldn't have known from Mr M's call that his card details had been added to someone else's device and he didn't volunteer this information. But given this was a known scam, I'd have expected it explore this regardless. But given that the complaint has already been upheld and this wouldn't entitle Mr S to further redress than what I've awarded, I've not explored this further.

My final decision

For the reasons I've explained, I uphold Mr S (trading as M)'s complaint. ClearBank Limited must:

- Pay Mr S (trading as M) the total of the unauthorised payments, less any amount recovered or already refunded.
- 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 Mr S (trading as M) to accept or reject my decision before 13 July 2023.

Emma Szkolar
Ombudsman