

The complaint

A company, which I'll refer to as H, complains that ClearBank Limited won't refund transactions it didn't make.

Miss C, the sole director of H, brings the complaint on H's behalf.

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

- Miss C explained she received a call from someone who claimed to be from Tide. She recalled they knew information about her and said H's account had been compromised and a large transaction had been attempted. They said they'd cancel and reissue her card and asked her to delete her Tide app.
- Miss C later realised that several Apple Pay transactions had left H's account. Miss C disputed making these with ClearBank. They declined to refund her because she must have shared a code with a third party to set up Apple Pay which is in breach of its terms of conditions.

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.

- In line with the Payment Services Regulations 2017 (PSRs), the starting position is that H isn't liable for payments it 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 H 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 H.
- 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*'. There's no more detail, so I've considered the practical steps someone needs to take to use Apple Pay. It seems that Miss C needed to have used her device, including the relevant security procedures, with the merchant to authorise the payment.
- Here, Miss C has presented evidence to show she was working that day, some distance from where the transactions took place. While ClearBank initially said the transactions were approved using Miss C's device, it later confirmed they took place on another device. Taking this all into account, I think it's more likely a fraudster made these payments after they duped Miss C into sharing a code to finish setting up

Apple Pay on their own device. This is in keeping with other scams both ClearBank and our service has seen.

- In saying this, I recognise Miss C hasn't been able to consistently recall whether she shared this code during the call. But given it's the only way Apple Pay could've been set up, I'm satisfied it's likely she did. However, given our experience of dealing with similar scams, I don't find it likely she did this understanding she was setting up Apple Pay on someone's device. Instead, I think she was tricked into sharing the information, having been led to believe that her account was being defrauded.
- ClearBank suggest that because she must have shared the code, she consented to the payments. But I'm not persuaded that her indirect involvement in setting up the means to make payments is the same as Miss C using the 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 Miss C could reasonably be described as having given someone permission to go through the form and procedure to make these payments, given the likelihood she was tricked into sharing the code under the belief she was ultimately keeping her account safe.
- It follows that I'm not persuaded she went through the agreed form and procedure to consent to the payments or gave someone else permission to consent to the payments on her behalf. They were, therefore, unauthorised.
- ClearBank can still hold H liable if it can show Miss C failed with gross negligence to comply with the terms of the account and keep her 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.
- Miss C received a call from someone pretending to be from Tide, who knew several pieces of her personal information and H's account information. They told her H's account had been compromised and they'd need to cancel and reissue her card.
- As I've explained, I think it's likely Miss C shared a code she received by text under the guise that she was ultimately protecting H's account from the circumstances they presented. And given how the caller credibly established themselves as being genuine and the urgent situation they presented, I can see how Miss C would've simply focused on the code in the message and shared it, without taking in the context and warning in the message.
- In saying that, I'm mindful that the message would've appeared from Tide at the time she'd been told to expect it by the caller – likely adding further to the veil of legitimacy. Taking these circumstances into account, while Miss C might have been negligent, I'm not persuaded it she acted with very significant carelessness to conclude she failed with gross negligence.
- I recognise Miss C subsequently referred to the call sounding 'dodgy'. But I'm mindful she said this after she realised it was a scam and had time to reflect on what happened. I don't think it's enough to say that Miss C appreciated and seriously

disregarded an obvious risk at the time. Instead, Miss C has consistently said she was panicked by the situation they presented.

- It follows that I don't think ClearBank has shown Miss C failed with gross negligence. So I conclude that H isn't liable for the disputed payments and ClearBank needs to put things right – by refunding its losses from these payments.
- If the disputed payments caused H to enter its overdraft, ClearBank must also refund any interest and charges associated with this, alongside removing any adverse information from H's credit report.
- ClearBank ought to have refunded this much sooner. So I also award 8% simple interest per year to compensate H for the time it's been out of pocket.

My final decision

For the reasons I've explained, I uphold H's complaint. ClearBank Limited must:

- Pay H the total of the unauthorised payments, less any amount recovered or already refunded.
- If the transactions caused H to enter its overdraft, ClearBank must refund any interest and charges associated with this, alongside removing any adverse information from H's credit report.
- 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 H to accept or reject my decision before 13 July 2023.

Emma Szkolar
Ombudsman