

The complaint

Ms F, representing M (a limited company), complains that New Wave Credit Limited (trading as Capital on Tap) has held M responsible for transactions which were not authorised.

What happened

On 12 September 2022 Mr B, a director of M, received a text alert stating that spending on M's Capital On Tap account had reached 50% of the credit limit. Mr B logged onto M's online banking and discovered that a series of payments totalling over £18,000 had been made from M's account

Mr B contacted Capital On Tap, he says he was told that pending payments could be stopped, but that was not the case, and all the payments went through. It transpired that an employee of M, who I'll call R, had been given a card for the account to use for business purposes. He had been contacted by scammers and manipulated into providing details of the card, the scammers then used those details to make the disputed payments.

Mr B complained to Capital On Tap on M's behalf, as he said the transactions had not been authorised by M.

Capital On Tap reviewed the complaint and held M liable for the transactions because it said it was against the terms and conditions of the account for M to allow someone who was not a named cardholder to use the card. Capital On Tap considered that M had not kept the card details safe and so was responsible for any unauthorised transactions.

Mr B didn't agree, so he referred M's complaint to our service. Our investigator initially recommended that M's complaint be upheld. He considered that, regardless of the fact that R had been given access to the card, the transactions themselves had been carried out without M's consent. So our investigator thought that Capital On Tap should refund the disputed payments and pay M £300 to recognise any inconvenience caused.

Capital On Tap didn't agree. They felt that, as an agent of M, R had acted against clear guidance in the credit agreement regarding what to do if you believed a card had been compromised. Capital On Tap stated that R should have contacted it directly when the fraudsters suggested the card had been compromised, rather than sharing the card details with the fraudster so that they could check.

The Investigator reconsidered their findings, and explained that, on reflection, he considered that M had failed to act in accordance with the terms and conditions of the account. He also noted that, in line with the relevant regulations, M can be held responsible for unauthorised transactions if it acted "with intent or gross negligence" and felt that sharing the card with someone who was not a named card-holder was an obvious risk. He concluded that it was therefore reasonable for Capital On Tap to hold M responsible for the disputed transactions.

M did not agree, so this complaint has been passed to me for a decision. I issued my provisional findings on this complaint on 13 July 2023, all relevant parties have now confirmed they accept those findings.

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 my provisional decision I explained the following:

“Generally, Capital On Tap can hold M for the disputed transactions if the evidence suggests that it is more likely than not that it authorised these payments or gave someone else consent to make them on its behalf.

I'm satisfied that these payments were properly authenticated – that is that the genuine card details were used to make these transactions. But the regulations relevant to this case – specifically the Payment Services Regulations 2017 - say that is not, on its own, enough to enable Capital On Tap to hold M liable.

The relevant regulations say that a payment transaction is authorised only if the payer – in this case M – has given its consent to the execution of the payment transaction. All parties here appear to be in agreement that Mr B (acting on behalf of M) gave a card for the account to an employee – R – to use for business purposes. This means that R was effectively authorised by M to use the card on its behalf.

But the transactions in dispute here were not made by R, they were made by a fraudster who manipulated R into sharing card details. The fraudster then used those card details to make payments – it appears they added the card to an electronic wallet on their own device and then use that to make contactless payments in stores.

So, when considering the circumstances of this complaint, I think M's consent extended only to payments that R made. Neither M nor a person acting on its behalf consented to the payments the fraudsters made. So the starting point here is that M should not be held liable for these transactions as they were not authorised.

Capital On Tap has said that M did not comply with the terms and conditions of the account. The terms require M not to share the card, account or security details with anyone other than cardholders. Capital On Tap's account terms go on to detail that it won't refund unauthorised transactions if the account holder has acted fraudulently or has been grossly negligent with (or intentionally shared) their card or security details.

While R was not a named cardholder, he was an employee of M, who had the card for purposes relating to M's business and was acting as M's agent. M is a limited company, and a separate legal entity, but it has people to act on its behalf. There's no suggestion here that M's representatives have acted fraudulently, so I don't intend to comment on that issue further. However, M's named cardholder did share the card details with an employee, R.

But I think there is a distinction to be made between sharing the card with an employee of the legal entity for business purposes and sharing the card with a third party. And I don't think it would be fair to conclude that M, as the consumer here, had acted with intent or gross negligence in doing so. This is because 1) of the relationship between M and R (that he was an employee using the card on behalf of M) and 2) that the contract here is between M and Capital on Tap – not between specific named card holders and Capital on Tap.

I've gone on to think about whether R, as a representative of M, acted with intent or gross negligence when sharing the card information with a third party as part of the same. Given the apparent sophistication of the fraud that was perpetrated on R, and that he believed he

was taking steps to protect the account, I don't think I can fairly say that he intentionally shared the card details or was otherwise grossly negligent.

I have already explained my reasoning here to Capital on Tap, and it has disagreed with my proposed findings. Specifically, Capital on Tap has said that its terms and conditions make it clear that cards are issued to named cardholders and that card details should not be shared with anyone who is not a named cardholder. I agree that M does appear to have breached the terms and conditions of the account by sharing the card details in this way, but I don't think that means that Capital on Tap is then relieved of any obligations regarding unauthorised transactions.

I note that Capital on Tap believes that breaching the terms and conditions in this way amounts to an act of gross negligence by M, but I don't agree. The bar for gross negligence is high, M would have to have shown a very significant degree of carelessness. And I don't consider that sharing the card details with a trusted employee meets that high bar.

I also note what Capital on Tap has said about the information that would have been provided to R about avoiding scams if he had been added as a named cardholder. Specifically, Capital on Tap has referred to a newsletter sent out in the weeks prior to the fraud, which confirmed that Capital on Tap would never ask cardholders to share one-time passcodes, card numbers, or security details. I don't though consider that it is reasonable to say that had R been sent this information the scam could have been avoided. There is no guarantee that such information – which was apparently contained in a newsletter, and not specific information provided at the time of a transaction – would have been read, nor that it would have prevented a sophisticated scam from taking place. Ultimately R was tricked into handing over card details, by a third party he believed was working for the card aggregator app he used, and I'm satisfied that by sharing the details he did in these particular circumstances I'm satisfied that R – as a representative of M – did not act with gross negligence or intent.

With all of this in mind I am currently intending to find that it was not fair for Capital On Tap to hold M liable for the disputed payments. I'm not satisfied Capital on Tap has demonstrated that M or its representative acted with gross negligence or intent, or that M or its representatives failed to comply with the spirit of the relevant regulations.

The relevant regulations say that M can be held liable for up to the first £35 of any loss arising from use of their credit token even where it has been used without consent. As this is allowed for in the terms and conditions of this account, I would find it fair and reasonable for Capital On Tap to withhold up to £35 from the total amount refunded.

Our Investigator initially suggested that Capital On Tap pay M £300 to recognise the inconvenience caused here, and I am currently minded to agree that amount is fair. Bearing in mind that M is a limited company, and therefore cannot be distressed by what has happened.”

Given that capital On Tap and M (and it's representatives) have confirmed they accept my provisional decision, I see no reason to change the findings I've set out above.

Putting things right

To put things right Capital on Tap should:

- refund the disputed transactions, withholding the first £35 in line with their terms and conditions if they choose to do so;

- rework M's account as if the transactions have never happened;
- if M have had to pay more towards their Capital On Tap account than they would have otherwise had to, that amount should also be refunded to them; and
- pay M £300 for the inconvenience caused.

My final decision

I uphold this complaint, New Wave Capital Limited trading as Capital on Tap should put things right in the way I've set out above, if it has not already done so.

Under the rules of the Financial Ombudsman Service, I'm required to ask M to accept or reject my decision before 14 August 2023.

Sophie Mitchell
Ombudsman