

## **The complaint**

Mrs M complains about Omnio EMI Limited holding her liable for transactions she says she didn't authorise.

Mrs M held a Vox Money account and card which was issued by Omnio EMI Limited. For ease, I have referred to Omnio throughout my decision.

## **What happened**

In July 2021, Mrs M noticed several transactions had been made from her account which she says she didn't make. She reported this to Omnio, but they held her liable for the fraud.

They said this was the fourth time Mrs M's account had been compromised within seven months and therefore couldn't reasonably refund the transactions. They also made the decision to close her account and gave Mrs M 60 days' notice. Mrs M complained to our service.

Our investigator reviewed things and agreed that Omnio had acted fairly. In summary, she said it was more likely Mrs M authorised the payments, and she'd already received money back from the previous three fraud claims. Our investigator didn't think there was any explanation as to how the card details were compromised and says Mrs M is expected to take reasonable steps to keep her details safe. Our investigator also argued that some payments had been made from a recognised IP address, and as the payments were made online and this wasn't out of character for Mrs M, she thought Omnio was fair to hold Mrs M responsible.

Mrs M's representative, on behalf of her, disagreed. In summary, he explained that Mrs M was elderly and had health vulnerabilities and he asked for the evidence relating to the IP address. He wanted to know what investigation had been done on any third-party individuals who could have accessed Mrs M's details and said he had now taken control of Mrs M's finances to avoid this happening again in the future.

As a decision couldn't be reached, the complaint was passed to an ombudsman at our service to review. She reached out to Omnio for some further information and they responded with an offer of settlement. Their offer was to reimburse Mrs M the monthly fees she has been charged since her account has been blocked to date and return the remaining funds in her account which equates to £117.20.

In February 2023, the ombudsman issued her provisional decision. In summary, she said:

- She felt it wasn't a clear-cut case, and there were indications that Mrs M may have carried out the transactions herself; or allowed someone to carry them out on her behalf.
- On balance she felt it was likely that Mrs M didn't authorise the transactions, asked for the money to be returned, along with 8% simple interest per annum.
- She was satisfied that it was reasonable for Omnio to close Mrs M's account
- Omnio's offer to refund the account fees to return the funds was fair.
- As Omnio had held her liable without clear-cut evidence, this will have added to the

distress caused by the fraudsters. She suggested Omnio pay Mrs M £250 compensation to reflect this

Mrs M, nor her representative, responded to the provisional decision.

Omnio did respond and disagreed. In summary, they said;

- Omnio doesn't fall within the scope of the Consumer Credit Act. They're not obliged to refund disputed transactions where it's apparent the consumer has acted negligently or been taken advantage of. They think Mrs M should recover the disputed funds through criminal or civil matters.
- There is clear evidence Mrs M hasn't taken reasonable steps to keep her personalised security credentials safe. The examples they gave include;
  - Mrs M would have received a new 16-digit card number, expiry date and CVV. Given the overall low values of fraud and pattern of compromise, they feel the activity displays someone who was known to Mrs M. Omnio stated it was extremely unlikely, if not impossible, a criminal would go to such efforts to target one individual with such low values.
  - They believe the fraudster would continue to attempt to use the card – however the attempted transactions ended shortly after it was reported, and this strengthens their thoughts that the person was close to Mrs M.
  - The merchants appear the same on all instances of disputed transactions and therefore the perpetrator would have had to login and update the payment details on the merchant website.
- Mrs M has had four cards with Omnio and only two merchants have been unique to all four cards.
- Even if Mrs M's card details had genuinely been compromised, an unauthorised individual wouldn't have access to all of the information so they have concluded only someone close to Mrs M could carry out this activity. Omnio believe Mrs M failed to keep her security information secure.
- Section 10 of their terms and conditions state that customers must keep their anti-virus software up to date – so if Mrs M's card details were compromised through a virus on one of her devices, she has breached the terms.
- My point on the 11 transactions which had been declined is incorrect and they believe these relate to subscriptions Mrs M set up and cancelled herself.
- The remaining £117.20 has been available for Mrs M to withdraw, however to date Omnio haven't received relevant bank details so they find it unfair to have to pay interest on this amount.

As the ombudsman who issued the provisional decision is unavailable, the case was passed to me to decide. I agreed that the complaint should succeed, but my reasoning was different. I issued a second provisional decision which said:

*While Omnio have raised further arguments, I haven't received any additional evidence to persuade me that the disputed transactions in question were authorised by Mrs M. I've explained further below. I don't see it's necessary to address each and every point in order to meet my statutory duty to determine this complaint.*

*Omnio are correct in that they are not held to the Consumer Credit regulations as they are an electronic money provider and therefore don't issue credit. So, this act hasn't played a part in my thinking. However, they are a payment service provider to Mrs M, so the relevant regulations are the Payment Service Regulations 2017 (PSRs). I've also considered the terms of the Omnio account, along with what I consider to be good industry practice.*

*In broad terms, the starting position at law is that Omnio as a payment service provider is*

*expected to process payments and withdrawals that a customer authorises it to make, in accordance with the terms and conditions of the customer's account. However, in line with this service's approach, including the PSRs, if I find it more likely than not Mrs M didn't authorise the transactions, Omnio should refund the disputed transactions.*

*I don't feel Omnio have provided enough to show Mrs M authorised the transactions herself. Omnio have justifiably raised several points that could suggest Mrs M authorised the transactions herself – or gave permission for somebody close to her to use her card. However, she has denied this. There is a strong argument that somebody close to her is making the transactions without her knowledge.*

*Omnio have argued that it's not realistic for a criminal to go to the lengths they have in Mrs M's case for such low values. But that isn't evidence to confirm that Mrs M authorised the transactions. Mrs M may have taken advantage of her – and there are several ways this could have been done. An individual could have had ample opportunity to take Mrs M's card and replace it without her knowing, which likely would only take seconds if all was needed were the card details.*

*Potentially Mrs M's card details could have been compromised online. Omnio have said Mrs M is under a duty to keep her anti-virus software up to date as per their terms and conditions. I have considered this term and I don't think it's fair to rely on such a significant and onerous condition. There's also no evidence that Mrs M's card details were intercepted through the result of a virus – although it is possible, the details could have also been intercepted through a genuine merchant. The fact is here, there is no evidence to say what's happened either way. And therefore, it's in my remit to say what I think is most likely in the circumstances.*

*Omnio feel a fraudster would continue to attempt to use the account – and as the activity stopped shortly after the disputed transactions were raised, they believe this is enough to show somebody close to Mrs M carried out the transactions, if not herself. Again, I don't consider this is enough to persuade me however that Mrs M gave permission for somebody else to use her card.*

*Omnio have suggested the 11 declined transactions referred to in the ombudsman's provisional decision relate to subscriptions Mrs M set up and cancelled. But based on the evidence Omnio have sent, the declined transactions consist of the following:*

<i>Date</i>	<i>Description</i>	<i>Status</i>	<i>Money Out</i>
<i>05/07/2021</i>	<i>Argos Ltd, Internet</i>	<i>Declined</i>	<i>£556.00</i>
<i>05/07/2021</i>	<i>Argos Ltd, Internet</i>	<i>Declined</i>	<i>£417.00</i>
<i>05/07/2021</i>	<i>Argos Ltd, Internet</i>	<i>Declined</i>	<i>£219.00</i>
<i>05/07/2021</i>	<i>Argos Ltd, Internet</i>	<i>Declined</i>	<i>£139.00</i>
<i>05/07/2021</i>	<i>Argos Ltd, Internet</i>	<i>Declined</i>	<i>£139.00</i>
<i>05/07/2021</i>	<i>Argos Ltd, Internet</i>	<i>Declined</i>	<i>£139.00</i>
<i>05/07/2021</i>	<i>LIM*ADD BALANCE</i>	<i>Declined</i>	<i>£10.00</i>
<i>05/07/2021</i>	<i>LIM*ADD BALANCE</i>	<i>Declined</i>	<i>£10.00</i>
<i>05/07/2021</i>	<i>Just eat</i>	<i>Declined</i>	<i>£19.67</i>
<i>05/07/2021</i>	<i>Monzo</i>	<i>Declined</i>	<i>£100.00</i>
<i>05/07/2021</i>	<i>Monzo</i>	<i>Declined</i>	<i>£100.00</i>

*Having considered these transactions again, it looks like the party using the account repeatedly had trouble accessing it, with payments being declined – all on the same dates as the payments in dispute. Therefore, I don't consider these declined transactions are linked to subscription services Mrs M cancelled herself but more than likely an unauthorised*

*individual attempting to use Mrs M's card without her permission and trying to carry out as many transactions as possible without Mrs M noticing.*

*Mrs M has denied making these transactions or giving someone permission to do so. And I've seen nothing from the merchants involved to suggest she did. Based on the evidence available, I'm satisfied she more likely than not didn't authorise these transactions.*

*Omnio have said they're not obliged to refund transactions where it is apparent the consumer has acted negligently. However, regulation 77 of the PSRs states that*

*(4) Except where a payer has acted fraudulently, the payer is not liable for any losses incurred in respect of an unauthorised payments transaction...*

*(d) where the payment instrument has been used in connection with a distance contract.*

*"Distance contract" in this clause generally means a contract entered in to for goods or service when not physically present with the merchant – although there are some exceptions, for example financial transactions or gambling. The full definition is given in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. This is clear in the relevant regulations that the negligence doesn't play a part in deciding liability for unauthorised payments in relation to a distance contract.*

*In this case the majority of the payments are marked as "internet" payments, so are likely to be distance contracts. Given the nature of the businesses I do not see it likely these will be excepted contracts. As I'm satisfied that these payments were unauthorised, I don't see that Mrs M should be held liable for them.*

*The other transactions – which are of an "unknown" type – seem to plausibly be distance contracts. But as I can't be sure, and for completeness sake, I've considered Mrs M's obligations to Omnio in relation to her security credentials. As mentioned Omnio believe she acted negligently with her payment instrument. But in section 77 of the PSRs explain that she can held liable for unauthorised transactions if she has failed to in her obligations to keep her security details safe either with intent or gross negligence. The terms of the account also refer to gross negligence.*

*I'm not persuaded that Mrs M intentionally gave somebody else her payment instrument – she denies doing so and nothing I've seen from Omnio persuaded me she did.*

*So, I've considered Omnio's position that Mrs M has behaved negligently. But to hold her liable they need to demonstrate she has been grossly negligent. Our service follows case law in believing that the bar for gross negligence is much higher than simple negligence. For me to be satisfied that Omnio can hold her liable for these transactions, I'd need to be satisfied that she not only appreciated an obvious and blatant risk, but also disregarded that risk.*

*I've considered this carefully, as Mrs M had been the victim of similar fraud several times before. There is an argument that reasonably she should have taken more care with her payment details and could have recognised a risk of somebody intercepting or copying them. But I'm also mindful that Omnio issued her with a new card after the last incident, which suggests to me they didn't see this as such a significant risk either. I'm not persuaded she acted with the very significant degree of carelessness that would be considered gross negligence. So, if these "unknown" transactions aren't distance contracts, I still don't agree that Mrs M should be liable for them.*

*As such I consider that the disputed funds should be returned to Mrs M. As she has been without the use of these funds then any refund should also include 8% simple interest per annum, from the date of payment to the date of settlement.*

*I've reviewed the information on the account closure, and like the previous ombudsman I'm satisfied this was in line with the terms of Mrs M's account. Omnio haven't been unreasonable here.*

*However, I agree that Mrs M should be paid compensation for Omnio's handling of her dispute. This will have been a very distressing experience for her, but I accept most of this distress will be down to the actions of the fraudsters. But I don't see it was reasonable for Omnio to hold her liable, when the PSRs are clear the distance contract transactions should have been refunded earlier. This left her short of funds, and Omnio were aware she was a vulnerable individual.*

*Omnio have offered to refund Mrs M the monthly fees she would have been charged since her account was blocked. This is reasonable in the circumstances. Omnio should refund these amounts to Mrs M and add 8% simple interest for the same reasons as explained above.*

*Omnio have rightly raised that they shouldn't be required to include interest to the amount held in Mrs M's account which has been available for her to withdraw. I haven't seen any evidence to show when Mrs M was made aware the money was available to her – so I consider the 8% interest should be paid on the amount held from when it was blocked up to when Omnio made Mrs M aware it was available. I don't consider interest should be paid for the time Mrs M hasn't supplied her bank details.*

To put things right, I was minded Omnio should:

- Refund the disputed transactions totaling £1,090.93. Omnio should add 8% simple interest per annum to this amount from the date of payment to the date of settlement.
- Reimburse Mrs M for the monthly fees she was charged from the date the account was blocked. Omnio should add 8% simple interest per annum to this amount from the date of the charge to the date of settlement.
- Refund Mrs M the £117.20 held in her account. Omnio should add the 8% simple interest per annum from the date of the block until the date they informed her the money could be withdrawn.
- Pay Mrs M £250 for the distress and inconvenience caused by the handling of her dispute.

Mrs M accepted this as a resolution. Omnio disagreed and responded to say, in summary:

- The PSRs allow them to hold Mrs M liable for unauthorised transactions on her account if she has failed to in her obligations to keep her security credentials safe with either intent or gross negligence.
- There were only two merchants used across all the cards Mrs M had reported fraud on. The likelihood was either a virus on her computer, or alternatively she had failed to keep her security details secure.
- The decision acknowledged there may have been ample opportunity to take and replace Mrs M's card, which highlighted to Omnio that she had acted negligently.
- That it is not within the Financial Ombudsman Service's remit to discount the term saying her anti-virus software should be kept updated.
- Mrs M had been grossly negligent by failing to keep her card details secure and not available for someone to obtain.

- That it was not justifiable to make assumptions about Omnio not seeing Mrs M as a risk when deciding whether Mrs M has been grossly negligent.
- The 8% interest awarded was unreasonable as the complaint had been with our service for a considerable period.

I have reviewed the evidence afresh.

### **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 remain satisfied with the conclusions drawn in the provisional decision. I appreciate Omnio have asked for detailed responses to the complaint points raised in their response before a final decision is issued. I have noted the additional points raised by Omnio and considered them carefully.

But my statutory duty is to consider the evidence available to me and determine the complaint by reference to what I consider to be fair and reasonable in the circumstances of the complaint. I'm satisfied I have enough evidence to do so here.

There seems to be no dispute that Mrs M didn't authorise the transactions herself, nor allow someone else to use the card. I'm satisfied that these can be treated as unauthorised transactions under the PSRs.

The response from Omnio to the provisional decision didn't engage with my findings around the distance contracts. So, for the avoidance of doubt I'm satisfied with my findings in relation to Section 77 on the PSRs. Paragraph (3) does refer to gross negligence, and this is what Omnio have relied upon in their response to the provisional decision.

However, Paragraph (4), quoted in the provisional decision, makes it clear that "except where a payer has acted fraudulently" the payer isn't liable for losses associated with distance contracts. This is the section that expressly deals with distance contracts, and there isn't provision in this paragraph for gross negligence. This is the long standing approach our service has taken in relation to unauthorised distance contracts, and the industry standard across the payment industry.

I've seen nothing to suggest Mrs M has acted fraudulently, or that the payments were for excepted contracts. I'm satisfied that the payments Omnio have confirmed were made online should be refunded to her. For Omnio to deny a refund of distance contracts on the grounds of negligence goes against both the regulations and what I consider to be good industry practice – and I find this to be unreasonable.

Omnio haven't confirmed whether the additional transactions marked as "Unknown" were distance contracts or not. I think it's more likely than not they were. But again, for completeness I've considered whether it's likely Mrs M was grossly negligent with her card details. And, as explained, the concept of *gross* negligence needs to go beyond simple negligence or carelessness. In my view, there needs to be not just acting with a significant degree of carelessness, but also a disregard for the risk involved.

But here, there is no clear indication as to how Mrs M's card or security credentials were compromised. The suggestions put forward by Omnio of access from an account with a third party website, or a virus on her computer, I'm not persuaded would be grossly negligent. In any event Omnio haven't produced any evidence to suggest a computer virus was involved in any way.

Even if a criminal had been able to intercept the card details with a virus or malware, this would only allow the thief to carry out payments for distance contracts – which as I've explained above would be refunded under the PSRs without consideration of gross negligence. As the PSRs already require Omnio to refund unauthorised distance contracts, it's disproportionate and onerous to place the obligation of keeping anti-virus software up-to-date on to the consumer. I don't agree with Omnio that its outside the scope of our service to consider the terms of accounts, and whether it's fair to rely on them in the circumstances of the complaint.

Likewise, if someone had briefly taken her card and copied the payment details, the thief would likely only be able to enter into distance contracts. And the expectation there is that the payment service provider would refund them. Omnio have offered no evidence that further security information, such as the PIN, was used in making these transactions. So, I've seen no compelling evidence Mrs M has been grossly negligent in respect to her personalised security credentials.

Overall, I'm not persuaded Omnio have been reasonable in declining to refund the transactions in dispute. I'm satisfied that the relevant regulations, and good industry practice, would require them to be refunded in short order. It's right therefore the transactions be refunded.

I've considered what Omnio have said about the 8% interest award. But I'm also mindful here that this is money Mrs M has been without the use of. And it should have been quickly evident to Omnio that the money should be refunded. So, on that basis I'm satisfied it's fair for Omnio to pay the 8% simple interest award. And it's also reasonable for Omnio to pay her compensation for the poor handling of her dispute.

The findings in the provisional decision on the account closure and return of fees haven't been disputed by either party. I remain satisfied with these findings.

### **Putting things right**

To put things right Omnio must:

- Refund the disputed transactions totaling £1,090.93. Omnio should add 8% simple interest per annum to this amount from the date of payment to the date of settlement.
- Reimburse Mrs M for the monthly fees she was charged from the date the account was blocked. Omnio should add 8% simple interest per annum to this amount from the date of the charge to the date of settlement.
- Refund Mrs M the £117.20 held in her account. Omnio should add the 8% simple interest per annum from the date of the block until the date they informed her the money could be withdrawn.
- Pay Mrs M £250 for the distress and inconvenience caused by the handling of her dispute.

If HMRC requires Omnio to deduct income tax from the above interest awards, then they should provide Mrs M with a certificate showing how much was deducted, if she should ask for it.

### **My final decision**

My final decision is that I uphold this complaint, and direct Omnio EMI Limited to settle the complaint as above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 28 August 2023.

Thom Bennett  
**Ombudsman**