

The complaint

A company, which I'll refer to as J, complains that ClearBank Limited (Tide) won't refund unauthorised payments taken from their account. Mr J, who is a director of J, brings the complaint on J's behalf.

What happened

The details of this complaint are well known to both parties, so I won't repeat them all again here. Instead, I'll summarise the key points, and focus on giving reasons for my decision.

In October 2022, Mr J was mugged. His phone was taken and he was also forced to hand over his phone passcode. Following this, a series of payments were made from J's account with Tide, as well as from two other accounts Mr J held with other firms. From the J account, around £16,000 was sent via transfers to new payees, and two card payments were made.

Mr J says he didn't realise that, by handing over his phone and passcode, the robbers would be able to access the bank accounts. When he saw the payments that had been taken, he reported them to the respective banks – as well as the police. I understand one bank agreed to refund the payments to third parties, but not the transfers made from that account into J's Tide account. Likewise, the other bank wouldn't refund him as the payments from that account were also paid into J's account.

Tide didn't agree to refund J. It rejected the card payments on the grounds that a security code, sent to Mr J's registered phone number, was used to add J's card to an Apple Pay account and make the payments. For the transfers, it said it hadn't been able to recall any funds from the beneficiaries. And as the funds originated from other accounts, Mr J should raise his concern with those banks.

Unhappy with this response, Mr J referred the matter to our service. Our investigator thought Tide should have identified the activity as unusual, and blocked the account pending further checks. So she thought Tide should refund J from the sixth payment onward (she has shared a list of the transactions with both parties).

Tide appealed the investigator's decision, so the case was passed to me to decide. At my request, it provided further information about the steps involved to make the payments. And, in summary, it raised the following points:

- The police investigation is ongoing and it has no way to track whether Mr J will repay any amount recovered by law enforcement.
- It didn't agree the payments looked unusual, as the funds were coming from accounts in Mr J's name.
- The final response from the bank who refunded Mr J in part doesn't make the basis of its refund clear, but Tide thinks it suggests they accept they should have intervened. It also wanted us to consider any information from the other bank as it said it hasn't been able to get hold of this.

- There was a delay reporting the matter to Tide and the police, which it felt is not what you would expect from someone who had been mugged and given access to his phone.

In September 2023, I issued my provisional decision explaining why I was minded to uphold the complaint. I invited the parties to respond with any further points or evidence. Both have now confirmed they have nothing further to add. So I'll proceed to finalise 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.

As I've not received anything new in response to my provisional decision, I see no reason to depart from that. I therefore uphold the complaint, for the following reasons.

Under the Payment Service Regulations 2017 (PSRs), J would generally be liable for authorised payments made from their account, and Tide would generally be liable for unauthorised payments.

The first consideration here is therefore whether the payments were authorised by J. In line with the PSRs, that comes down to whether J consented to the execution of them. That consent must have been given in the form, and in accordance with the procedure, agreed between Tide and J.

Mr J says he didn't complete the payments, as they were made using his phone which wasn't in his possession at the time. He says he didn't grant the muggers consent to make payments on his behalf – and also didn't realise they would be able to do so based on him handing over his phone and its passcode (which he did under duress).

I understand Tide's concerns about what happened here. I acknowledge that there are some points in Mr J's account of what happened that are a bit unclear or surprising. It took a few days for him to report the fraud to the affected banks and the police. The pattern of activity also looks a bit unusual, given that the funds lost via Tide were loaded from other accounts Mr J held – rather than exclusively being stolen directly from the originating accounts.

However, I don't view all these apparent irregularities with the same level of suspicion as Tide. For example, there was some confusion around Mr J telling Tide, when reporting the fraud, that his phone hadn't been stolen. But he has explained he had a new phone by that point. He thinks he got confused and was responding about the phone he was using.

In another chat, around 40 minutes later, Mr J told Tide his phone had been stolen and he had reported this to the police. And he has also provided a witness statement to the police backing this up, including the following declaration:

"This statement... is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false, or do not believe to be true"

Given the severity of this declaration, I find it compelling. Mr J has also provided further evidence that, while the investigation hasn't completed, it is still ongoing. And there are details from this which further support that his phone was stolen. For example, in the emails I've seen, the police refer to CCTV evidence showing a masked individual attempting to use Mr J's phone to pay in a shop around the time of these payments.

Where information is unclear or contradictory, it's my role to decide what is more likely on the balance of probabilities. And on balance, I do consider it more likely that Mr J's phone was stolen – and that the transactions were made without his consent.

For the card payments, Tide says a security code was sent to Mr J's registered phone to add a new card on to an Apple Pay account. And that was used to make these payments.

For the transfers, Tide has confirmed the app could be accessed from an unlocked device by entering a security code, generated during account recovery. One Time Passcodes (OTPs) would also have sent to the number on file when adding new payees. It acknowledges: *"in the case that a malicious actor has been granted full access to the device and app these systems would not be able to adequately prevent fraud."*

It doesn't appear Mr J completed these steps, given the evidence the phone wasn't in his possession at the time. Nor do I think, based on his testimony, that he gave the muggers consent in the form, and in accordance with the procedure, agreed by the bank. All he shared was access to the phone, and his phone passcode. I therefore think these payments were unauthorised. Meaning the starting position under the PSRs is that Tide is liable.

That said, Tide could still hold J liable if Mr J failed, with gross negligence or intent, to keep J's personalised security credentials safe – or abide by the account terms – and that allowed the fraud to take place.

I don't think Mr J intentionally failed to meet these obligations. He didn't intend to put his account at risk by handing over his unlocked phone. He didn't realise the muggers would be able to get access his accounts.

Nor am I persuaded Mr J failed with gross negligence. There is a high bar for this. He would need to have shown a very significant degree of carelessness. Such as serious disregard of, or indifference to, an obvious risk.

Although I appreciate there was a delay reporting the theft and notifying the bank, I can see why Mr J didn't foresee the risk that, by having access to his unlocked phone, the muggers would be able to access his account in this way. I don't think the risk was obvious; I think lots of people in his situation wouldn't have realised this. So, in line with the PSRs, I think Tide is liable to refund J for the loss incurred from these unauthorised transactions.

I'd also point out that, if any of the card payments were 'distance contracts' where the payment token wasn't physically present – as one appears to be – then the test is whether Mr J acted fraudulently or authorised the payment. As I'm satisfied he didn't, regardless of gross negligence, Tide is liable under the PSRs for any such payments.

I also agree with the investigator's argument that there is a further failing by Tide here. Taking into account relevant rules, codes and best practice, we expect banks to have measures in place to monitor for, and respond to, fraud risks. Although the activity was being completed using Mr J's registered device, I think the activity was concerning enough that Tide should have completed further checks to satisfy itself on whether J's account was at risk from fraud.

That's because there was a flurry of payments in and out of the account that looked significantly uncharacteristic within J's normal account activity. Several new payees were added. While these were verified using OTP codes, the way in which this fraud occurred shows this isn't always enough to ensure customers aren't at risk. Especially bearing in mind we expect banks to monitor not only for unauthorised payments – but also for authorised scams. In response to the level and nature of the account activity, I don't think Tide acted proportionately.

If Tide had blocked the account activity, pending direct contact from Mr J, to ensure he hadn't fallen victim to an account takeover or some other form of fraud – as I think it had grounds to be concerned about – it would have been harder for the thieves to bypass that. Tide's inaction here has likely contributed to the loss.

I appreciate Tide is unhappy to be held liable for the payments when the money was funded from two other accounts. But J has the right to complain to Tide about these payments. And it has an obligation to J for these in line with the PSRs. Particularly bearing in mind this is the point at which the funds were transferred on to third parties – rather than remaining in accounts which Mr J had authority on.

It wouldn't be fair for Mr J to effectively receive "double recovery". But he has shown us evidence that one bank hasn't refunded him, on the basis that the payments were sent on to this account, which he was authorised on. He has also provided records to show the other bank has refunded some, but not all, of these payments. If Tide requires further information about this, to ensure it doesn't refund any payments which Mr J has already been reimbursed for, that would be reasonable. But I don't think it can fairly negate any responsibility for J's loss.

Similarly, while the police investigation is ongoing, Tide still has a duty to J for the loss. Mr J hasn't recovered any funds from this investigation, nor have I seen any indication he is likely to. So again, I don't think that's a fair reason for Tide not to refund J.

Overall, I therefore conclude Tide should refund J for the outstanding loss incurred in relation to the unauthorised payments made from the account. Along with interest to compensate for the loss of use of the funds – which should have been refunded promptly, in line with Tide's obligations under the PSRs.

In its final response, Tide offered £250 compensation. This appears to have been for personal upset suffered by Mr J, relating to service failings when he raised the fraud claim. It doesn't appear to reflect any impact on J – which, as the account holder, is the eligible complainant raising this complaint. So, if this compensation hasn't been paid – which I don't believe it has been, and neither party has corrected me on this point – then I don't think Tide needs to pay this *on top of* refunding J for the outstanding loss, with interest.

My final decision

For the reasons given above, my final decision is that I uphold this complaint about ClearBank Limited. To put things right, it must:

- Refund J for the unauthorised payments taken from their account, less any amounts recovered or already refunded.
- It should also pay interest on this amount, at a rate of 8% simple interest per year for those originating from the current account, and at the originating account interest rate for those which were funded from the savings account.

ClearBank Limited must pay the compensation within 28 days of the date on which we tell it J accepts my final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask J to accept or reject my decision before 2 November 2023.

Rachel Loughlin
Ombudsman