

## **The complaint**

Mr C complains that HSBC UK Bank Plc (HSBC) is holding him liable for payments which he says he didn't make.

## **What happened**

Mr C reports that in early June 2023, he got a notification of spending on his card. When he checked his account, he found several unrecognised transactions throughout the past week. So, he called HSBC to report the transactions.

During the reporting call, Mr C said he was in his hometown in the UK throughout the period of the transactions – which were made abroad – and had been using Apple Pay for any card payments. But he still had his card, and he hadn't shared or written down his PIN.

HSBC didn't agree to refund Mr C for the payments. It said the transactions had been made using his actual card, and were authenticated via chip and PIN. It said there weren't any known incidents where a card chip had been successfully copied.

It further explained that when a card is cloned, ATM transactions will revert to using the magnetic stripe (rather than the chip) for verification. Yet the ATM transactions Mr C had disputed had successfully read the chip. Furthermore, it couldn't see how Mr C's PIN could have been intercepted – nor how the card could have been used and returned to Mr C without him noticing.

Mr C complained but HSBC maintained its stance, although it did pay £100 compensation for some service issues while it considered the fraud claim. Unhappy with this response, Mr C referred the matter to our service.

Our investigator didn't uphold the complaint. In summary, they didn't think there was a plausible explanation for how Mr C's card and PIN could have been used to make the payments without his knowledge or consent. Beyond the compensation HSBC had already paid, they didn't think it needed to do more.

Mr C has appealed the investigator's outcome. He says he was in the UK, which is shown by his Apple Pay transactions. And that HSBC hasn't proved his genuine card was used – and even if it had, we/the bank can't assume it was used with his permission. He also said HSBC's actions were to the detriment of Consumer Duty.

The investigator explained they had reviewed HSBC's audit information to see how the payments were authenticated, and it was that evidence they were relying on to conclude the genuine card was used. They also explained Consumer Duty wasn't in force at the time of the transactions, so wasn't a relevant consideration. As no agreement was reached, the case has been escalated to me for a final 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 decided not to uphold it. I'll explain why.

Mr C denies authorising these payments. So, under the relevant regulations – the Payment Services Regulations 2017 (PSRs) – HSBC is expected to show they were authenticated correctly.

Having reviewed its audit information, I'm satisfied it has shown the disputed payments were successfully authenticated via chip and PIN. That process is used to try to make sure the person making the payment is the actual customer – or someone acting on their behalf.

However, that in itself isn't enough to show Mr C actually authorised the payments. As the PSRs explain, that comes down to whether he consented to them. The PSRs set out how consent must be given – it must be in the form, and in accordance with the procedure, agreed between Mr C and HSBC.

In practical terms, that means Mr C consents to a payment if he completes the agreed payment steps – such as putting his genuine card into a payment terminal and entering his PIN. Or if someone else (an agent) acted on his behalf and used those agreed steps.

Agency can be created not only by the bounds of the actual authority granted by the principal. But also by the acts of the agent which appear to have been made with the principal's authority. If Mr C allowed someone else to use his card, that individual would be treated as his agent and the payments they made would generally be considered authorised.

I know Mr C feels the investigator made an assumption in determining that he likely consented to the payments. It may help to explain that our service considers cases on the balance of probability. That means when information is incomplete, contradictory or unclear, it is our role to use the available information to decide what's *more likely* to have happened.

Having carefully considered all the circumstances at play here, I don't think it's likely these payments were completed without Mr C's consent. I'm persuaded HSBC's audit evidence does show that the genuine card was used to make the payments. I can see the chip and PIN were used to authenticate all the payments. And there is little evidence to suggest the integrated chip can be cloned or copied in order to be used in this way.

It also appears the disputed spending took place abroad, over the period of a week. But when Mr C reported the dispute, he confirmed he still had his card. I struggle to see how an unauthorised person could have got hold of, then returned, his card in order to make these payments.

I note Mr C has suggested he noticed the payments the night before but wasn't able to get through to HSBC until the next day. However, the last payment was only completed around one hour before the first contact I can see between HSBC and Mr C about this matter, followed by further contact the next morning. I think that casts further doubt on how/whether someone would have been able to gain access to and then return the card without him noticing.

Additionally, in order to make these payments, it wasn't enough for someone to get hold of Mr C's genuine card. They also needed to know his PIN. From the information I've got, I don't have a plausible explanation for how this could have been compromised.

As Mr C had the card on him, it doesn't appear that this was a "shoulder surfing" incident, for example – where someone is overseen entering their PIN to make a payment, and then their card is stolen. He also says he generally uses Apple Pay for transactions – and hasn't shared his PIN. From what he has told us about the safety precautions he takes, there is no likely explanation I can see for how someone knew his PIN, in addition to obtaining and returning his genuine card, as would have been needed to make these payments.

I note the spending also occurred over the space of a week, with gaps of days in between when the card was being used. Around £650 was spent on the first day, then there was a gap of three more days when the card wasn't used. Following which there was a transaction for just under £500. The card wasn't used the next day, before being used again for some higher amounts.

While I place less weight on this evidence, when considering it *alongside* the other evidence I have addressed above, it does strike me as unusual if this was done by an opportunistic fraudster. The higher spending didn't happen until the card would have been in a fraudster's possession for almost a week, whereas you would expect them to try to maximise the amount they were able to spend immediately. It also seems risky for them to leave gaps of days in between the payments – increasing the window in which Mr C may have spotted the spending and blocked the card.

Mr C points out he was making Apple Pay transactions in the UK during this period – and can't be in two places at once. But as explained, it is also possible for him to grant someone else authority to make payments for him by granting access to his card – or even through granting access to Apple Pay.

While Mr C has cited Consumer Duty, the event he is complaining about occurred from late May to early June 2023. Whereas Consumer Duty came into force at the end of July 2023 – also after HSBC issued its final response to Mr C's complaint. So, that isn't a relevant consideration here. What I'm predominantly considering is the PSRs – which already place liability on banks (in most instances) for unauthorised transactions.

The issue here is that, having carefully weighed up all the available information, I consider it improbable that someone would have been able to access Mr C's genuine card and PIN, which I'm satisfied was used to make these payments, without his knowledge and consent. So, overall, I consider it likely the payments were authorised. Bearing in mind that would include not just Mr C making the payments directly, but also if he allowed someone else access to his card. I therefore don't think HSBC is obliged to refund him.

On what has been submitted, I also don't think HSBC needs to pay further compensation for Mr C's distress and inconvenience (which is separate to his financial loss, which I have considered above). While HSBC accepts it caused some inconvenience during a call towards the end of the process, I've not seen anything which persuades me the impact this had on Mr C warrants more than the £100 compensation it has already paid. Ultimately, it had already given its answer to Mr C's claim by that point – an answer which I've decided was fair.

### **My final decision**

For the reasons given above, my final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 19 April 2024.

Rachel Loughlin  
**Ombudsman**