complaint

Mr M complains that Bank of Baroda have unfairly declined to refund payments totalling £109,000 made from his bank account, which he says he didn't authorise.

background

Mr M held a fixed-term deposit account and a basic operating account with Bank of Baroda. He says his email account was hacked in May 2016, where a fraudster was able to send payment instructions to the bank asking them to transfer a total of £109,000 to two different third-party accounts.

Bank of Baroda have said the following activity occurred in relation to Mr M's account, with all emails having been received from Mr M's registered email address:

Date	Time	Event	Amount
24/05/2016	08:10	Email sent to Bank of Baroda with passport copy and signed instruction for payment – the sender also provides a new telephone number for the bank should they wish to confirm the transfer.	
	14:20	Bank of Baroda respond saying the signature does not match their records and ask the sender to provide the payment instruction again with the correct signature.	
	17:42	Email sent to Bank of Baroda with another signed payment instruction for £43,000 to be transferred to a third-party account.	
25/05/2016	08:39	Email sent to Bank of Baroda chasing previous payment instruction.	
		£43,602 (£43,000 plus £602 interest paid on the amount withdrawn) transferred from Mr M's fixed deposit account to his basic account	
		£43,000 transferred from Mr M's basic account to third party account ending 364.	£43,000
27/05/2016	09:38	Email sent to Bank of Baroda with another signed payment instruction to transfer two payments of £22,000 to third party account ending 364 and £24,000 to third-party account ending 693.	
		£46,646.52 (including interest applied to the withdrawn amount) transferred from Mr M's fixed deposit account to basic account.	
		£22,000 transferred from Mr M's basic account to third party account ending 364.	£22,000
		£24,000 transferred from Mr M's basic account to third party account ending 693.	£24,000
31/05/2016	09:52	Email sent to Bank of Baroda with another signed payment instruction to transfer £20,000 to third party account ending 693.	
01/06/2016		£22,550.73 (including interest applied to the withdrawn amount) transferred from Mr M's fixed deposit account to basic account.	
		£20,000 transferred from Mr M's basic account to third party account ending 693.	£20,000

			Total: £109,000

Mr M says the first indication he had that his email account had been hacked was when he was contacted by another bank with whom he holds a current account ("W Bank") on 1 June 2016, where he was asked to confirm whether he had sent a payment instruction of £38,000. Mr M confirmed that he had not made any such request, and W Bank were able to prevent any funds from leaving his account.

However, Mr M says he didn't think there was any risk to the funds in his Bank of Baroda account because his money was held in a fixed-term deposit account, and he says he was under the impression the funds could not be accessed until the end of the fixed term in December 2019. As a result, Mr M says he did not check his account with Bank of Baroda at the time. So the first indication he had of the £109,000 being transferred out of his account was when he received his account statements in June 2016, at which point he reported that he hadn't carried out or authorised the four payments made from 27 May 2016 to 1 June 2016.

Mr M says he doesn't know how the fraudster was able to hack into his email account. But he suspects it could have occurred when he was travelling in India, as the hotels he stayed at took copies of his passport upon check in, and he regularly used hotel computers to access his email account. So he thinks they may have been able to hack into his email account where they were then able to issue the payment instructions.

In considering Mr M's case, Bank of Baroda said:

- The payment instructions were sent from Mr M's registered email address and supported by a copy of his passport. The instructions were also signed by him and the signatures matched the specimen signature held on record. An email was further sent on 25 May 2016 from *another* email address seemingly belonging to Mr M, confirming that the payments had been received.
- They were under no obligation to verify the instructions over the phone, but as an additional measure they contacted the sender to verify the signatures – but there was no answer.
- They have the sole discretion to agree to the early closure of fixed term deposit accounts when requested by their customers, which was why the funds were able to be withdrawn from Mr M's account, and because he had previously issued such instructions in the past.
- Mr M had opted to send payment instructions by email and had previously withdrawn £202,000 by way of email instruction on 21 January 2015. There is no difference in modus operandi between this historic transaction and those currently in dispute.
- When questioned about the £202,000 withdrawal, Mr M disingenuously sought to dispute this transaction as well, intending to make unfair gains. He has not acted in an honest and reliable manner to allow him the benefit of the doubt.
- Mr M should have informed Bank of Baroda of the incident with W Bank as soon as he was informed of the attempted fraud on 1 June 2016.
- The case of *Tidal Energy Ltd v Bank of Scotland PLC* [2014] EWCA Civ 1107 set down the legal authority that a bank cannot be held liable for facilitating the defrauding of its customers so long as it follows established banking practice. So Bank of Baroda cannot be held liable for the amount taken from Mr M's account as they had followed their correct procedure.

Our investigator upheld Mr M's complaint. She didn't think there was enough evidence to suggest that he had authorised the payments, so she considered that Bank of Baroda should refund the money that was taken. Bank of Baroda disagreed, so the matter was passed to me to determine.

I issued my provisional decision in March 2020. I said I intended upholding Mr M's complaint and set out the below provisional findings:

When considering what is fair and reasonable, I'm required to take into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.

Bank of Baroda as an FCA regulated firm provided a deposit and basic operating payment account. As such the FCA's overarching principles for business apply including the requirement to 'Treat Customers Fairly'. This fraud took place in May 2016, so of particular relevance to my decision about what is fair and reasonable in the circumstances of this complaint, are the Payment Services Regulations 2009 (the PSRs 2009) which apply to transfers like the ones made from Mr M's basic operating account. Among other things, the PSRs 2009 say:

> *"**Consent and withdrawal of consent***
>
> *55.— (1) A payment transaction is to be regarded as having been authorised by the payer for the purposes of this Part only if the payer has given its consent to —*
>
> *(a) the execution of the payment transaction; …"*
>
> ***"Obligations of the payment service user in relation to payment instruments***
>
> *57.— (1) A payment service user to whom a payment instrument has been issued must—*
>
> *(a) use the payment instrument in accordance with the terms and conditions governing its issue and use; and*
>
> *(b) notify the payment service provider in the agreed manner and without undue delay on becoming aware of the loss, theft, misappropriation or unauthorised use of the payment instrument.*
>
> *(2) The payment service user must on receiving a payment instrument take all reasonable steps to keep its personalised security features safe."*
>
> *"**Evidence on authentication and execution of payment transactions***
>
> *60.— (1) Where a payment service user—*
>
> (a) *denies having authorised an executed payment transaction; or*
>
> *(b) claims that a payment transaction has not been correctly executed, it is for the payment service provider to prove that the payment transaction was authenticated, accurately recorded, entered in the payment service provider's accounts and not affected by a technical breakdown or some other deficiency.*
>
> *(2) In paragraph (1) "authenticated" means the use of any procedure by which a payment service provider is able to verify the use of a specific payment instrument, including its personalised security features.*
>
> *(3) Where a payment service user denies having authorised an executed payment*

transaction, the use of a payment instrument recorded by the payment service provider is not in itself necessarily sufficient to prove either that—

(a) the payment transaction was authorised by the payer; or

(b) the payer acted fraudulently or failed with intent or gross negligence to comply with regulation 57."

"Payment service provider's liability for unauthorised payment transactions

61. Subject to regulations 59 [Notification of unauthorised or incorrectly executed payment transactions] and 60, where an executed payment transaction was not authorised in accordance with regulation 55, the payment service provider must immediately—

(a) refund the amount of the unauthorised payment transaction to the payer; and

(b) where applicable, restore the debited payment account to the state it would have been in had the unauthorised payment transaction not taken place."

*"**Payer's liability for unauthorised payment transaction***

62.— (1) Subject to paragraphs (2) …, the payer is liable up to a maximum of £50 for any losses incurred in respect of unauthorised payment transactions arising—

(a) from the use of a lost or stolen payment instrument; or

(b) where the payer has failed to keep the personalised security features of the payment instrument safe, from the misappropriation of the payment instrument.

(2) The payer is liable for all losses incurred in respect of an unauthorised payment transaction where the payer—

(a) has acted fraudulently; or

b) has with intent or gross negligence failed to comply with regulation 57."

So if a payment is unauthorised, the starting point according to the PSRs 2009 is that the bank will refund the payment. That is *unless* it can be shown that the payer acted fraudulently or failed with intent or gross negligence to comply with Regulation 57. This is also stated in the general terms and conditions applicable to Mr M's account at the time (section 17.2), which broadly reflect the provisions contained in the PSRs 2009:

the terms and conditions of Mr M's account

"4.4.5 Security

4.4.5.1 – In order to protect your Account against misuse, you must:

- *Keep your PIN and your other security details secret; and*
- *tell us immediately if you think someone else may know any of your security details; and*
- *act with reasonable care, including taking reasonable steps to prevent unauthorised use of your security details…"*

"*4.4.5.2 – You will be responsible for all losses caused by:*

- *any fraudulent activity on your part; and*
- *any person acting with your authority…"*

"17.2 – You will not be liable for any payment instructions you did not give yourself, even if they were given using your card or Security Details, unless we can prove either:

17.2.1 – that you have acted fraudulently in which case you will be liable for all payments from the Account that we have been unable to stop; or

17.2.2 – that you have been very careless with your card or security details (for example if you do not tell us as soon as you think someone has discovered your security details or is accessing your Account without your authority or you broke your obligations in condition 13, in which case…you may be liable for payments from your Account".

So in light of the above, I consider there are two key questions relevant to my considerations:

1. Were the disputed transactions authorised by Mr M? and;

2. If they were not, did Mr M act fraudulently, or fail with intent or gross negligence to comply with his obligations under Regulation 57 of the PSRs 2009 – in particular, did he fail to use the payment instrument in accordance with the terms and conditions of his account, notify without undue delay upon becoming aware of the unauthorised use of the payment instrument, or keep the personalised security features of the payment instrument safe?

were the disputed transactions authorised by Mr M?

Regulation 55 of the PSRs 2009 states that the payer must give consent, and it *"must be given in the form, and in accordance with the procedure, agreed between the payer and its payment service provider"*. The payment services directive itself (which the PSRs 2009 implement) says *"In the absence of such consent, a payment transaction shall be considered to be unauthorised".* And in accordance with Regulation 55, it's important to note that it must be the *payer* that gives consent – not a third-party that is purporting to be the payer.

In this instance, funds were transferred from Mr M's fixed deposit account to his basic operating account, where payments were then made to a third party via payment instructions sent by email. I can see that Mr M did opt in for 'Net banking' when he opened his account, and he specified the email address to be used for this purpose. However, there does not appear to be any specific provision made for payment instructions sent by *email* within Bank of Baroda's terms and conditions, apart from the general position set out in section 4.4.2, which states that instructions can be given in writing if accompanied with a signature. So I've considered the relevant provisions of the terms and conditions to determine what the agreed 'form and procedure' is for a payment to be made via written instruction. The terms say:

"6. ***Payments out of your account***

6.1 – We will make payments out of your account if;

- *There is available money in your account, either in cleared funds or an agreed overdraft limit*
- *You have signed a cheque or other document containing payment instructions…"*

"6.3 When you give us a payment instruction (other than by cheque), you must give us the Sort Code and Account number for payments in the UK…and any other details we ask your for such as the name of the person you are sending the payment to, so we can make the payment".

So in order to complete the agreed form and procedure for a payment to be made, Mr M had to complete the following steps:

1) He had to sign a document containing a payment instruction;
2) He had to give the sort code, account number and name of an intended payee.

And having considered all the evidence available, on balance, I'm not satisfied that Mr M did complete the agreed form and procedure for a payment to be made, because of the following circumstances which suggest these steps were actually completed by an unauthorised third party:

- Bank of Baroda identified that the initial signature provided with the first payment mandate sent on 24 May 2016 did not match the signature they held on file.
- A different and unknown telephone number was provided for Bank of Baroda to contact, which did not match the telephone number held on file for Mr M.
- The emails containing the payment instructions had numerous spelling mistakes and unusual references e.g. referring to a "Royal bank account" (instead of Royal Bank of Scotland account) and "Natwes" – which does not match the form and style of previous genuine payment instructions sent by Mr M.
- Two different email accounts (one from MSN and one from Hotmail) were used to correspond with Bank of Baroda. Mr M says he didn't have a Hotmail account, and that only his MSN address was registered with the bank.
- Mr M was contacted by W Bank on 1 June 2016 – which is around the same date the funds were taken from his account with Bank of Baroda – because they became suspicious of an email from someone purporting to be Mr M. The circumstances were the same in that it involved a payment instruction sent from Mr M's email address with a copy of his passport. W Bank were also contacted by telephone by someone chasing the payment requests. W Bank has provided a copy of these call recordings, which show that the calls were placed by a male with a foreign accent, which does not appear to have been Mr M (having heard his voice on subsequent calls). The individual called a number of times but was unable to answer the necessary security questions to confirm his identity. W Bank became suspicious of this, which was when they contacted Mr M who confirmed he had not made any requests for payments to be made. So, given the circumstances and timeframe of the attempted fraud with W Bank, I consider it likely it was the same individual that sent the fraudulent payment instructions to Bank of Baroda.
- The receiving accounts were not held in the name of Mr M, despite the payment instructions stating they were. The receiving bank has also confirmed that the two third-party accounts that the funds were transferred to (ending 364 and 693) were both opened on 9 March 2016 and 10 February 2016 respectively, and subsequently closed on 23 June 2016 and 17 July 2016 – soon after the money had been transferred, which can be a typical indication of third-party fraud.
- Mr M says he doesn't know how the fraudster was able to hack into his email account and obtain a copy of his passport. He says he has never written down his email password but suspects his account could have been hacked when he was travelling in India, as the hotels he stayed at took copies of his passport upon check in, and that he regularly used hotel computers to access his email account. I don't need to determine how exactly this occurred, but I find this supposition plausible. And I'm not persuaded that Mr M has acted fraudulently himself in this instance. So, in the absence of any other persuasive evidence, I accept it's likely his email account was hacked, and that it was not Mr M who sent the payment instructions from the account.

I appreciate the payment instructions were sent from Mr M's registered email account. But Mr M has said his email account was hacked. He says that when he was informed of the fraud by W Bank on 1 June 2016, he immediately sought to change the password for his email account. However, he says that the fraudster who hacked his account had already changed the password, meaning he was not able to access it.

So taking all the above circumstances into account, I'm not persuaded that Mr M completed any of the steps required to complete the agreed form and procedure for a payment to be made from his account – i.e. providing payment instructions with his signature – along with the account details of the intended payee. I consider it more likely that these steps were carried out by the third party. I also accept Mr M's evidence that he didn't know or consent to someone else completing the form and procedure on his behalf. And whilst the payments were authenticated in terms of the steps taken with the payment instruction sent by email, he didn't consent to the execution of the payment transactions. So it follows that the payments must be *unauthorised*.

did Mr M act fraudulently?

I also appreciate that Bank of Baroda have concerns about Mr M and whether he has acted honestly. They have said that when Mr M was questioned about a previous withdrawal of £202,000 in January 2015, that he disingenuously sought to dispute this transaction as well, intending to make unfair gains. So they submit that he has not acted in an honest and reliable manner to allow him the benefit of the doubt. However, I haven't been provided with any evidence of this (there is no call recording or call notes of any such discussion, for example). And having put this to Mr M, he says he does not recall ever disputing this payment, and he has confirmed that this was a historic payment he *had* authorised. So in the absence of any further evidence or context surrounding this I'm not persuaded he had attempted to make a fraudulent claim in the past or that this is what he was doing in relation to these payments.

did Mr M fail with intent or gross negligence to comply with his obligations under Regulation 57 of the PSRs 2009?

The key issue I need to consider here is whether Mr M failed with intent or gross negligence to comply with his obligations to:

- Use his payment instrument in accordance with the terms and conditions of his account;
- Notify without undue delay on becoming aware of the loss, theft, misappropriation or unauthorised use of the payment instrument;
- Take all reasonable steps to keep the security features of the payment instrument safe.

Mr M says he first became aware of the fraudulent transactions when he received his bank statements in early June 2016, which showed that £109,000 had been taken from his account, at which point he says he reported the activity. But Bank of Baroda submit that Mr M should have informed them of the incident with W Bank as soon they informed him of the attempted fraud on 1 June 2016. As a result, they submit that Mr M failed (either with intent or gross negligence) to notify the bank '*without undue delay on becoming aware of the loss, theft, misappropriation or unauthorised use of the payment instrument*' as required by Regulation 57.

I've considered this point carefully and thought about what would constitute the 'payment instrument' in this case. The PSRs 2009 define a 'payment instrument' as any–

> *'(a) personalised device; or*
>
> *(b) personalised set of procedures agreed between the payment service user and the payment service provider*
>
> *used by the payment service use in order to initiate a payment order'.*

Given that there was no 'personalised device' used to make these payment instructions, I've considered what could reasonably constitute the set of procedures agreed between the two parties here. In this case, the disputed transactions were executed as a result of a payment instruction in the form of a signed document sent via email.

I don't think that Mr M's email account can be considered as the 'payment instrument' in this context, as it was simply the method of communication in which the payment order was sent. And as I've set out previously, Bank of Baroda's terms and conditions do not make any provision for banking by email specifically. But the terms do state that the bank will make payments from the account if Mr M has '*signed a…document containing payment instructions'*. In light of this, it appears to me that these terms likely constitute the '*set of procedures agreed between the payment service user and the payment service provider'* – specifically the requirement for a signed document. So I consider the signature on the signed document is the 'payment instrument' in this context. And I note that Bank of Baroda did not process the initial payment order because the signature provided did not seem to match the specimen they had on record – which further supports the supposition that Mr M's signature on the document was the payment instrument used to initiate the payment order here.

W Bank have provided evidence that shows the third party also attempted to transfer funds out of Mr M's account in the same way – of which they alerted him on 1 June 2016 that someone was sending instructions from his email account. Bank of Baroda say that Mr M should have notified them as soon as he became aware of the attempted fraud on his account with W Bank. And given that he failed to do so and did not notify them until he received his statements, they submit that he has failed to notify them *'without undue delay*'. But I do not consider that he has.

I appreciate that there may have been an unauthorised use of Mr M's signature on 1 June 2016 in the attempted fraud with W Bank. But this forms part of a different set of procedures agreed with a separate bank, and was distinct from those agreed with Bank of Baroda. So I do not consider that he has failed in his obligation to notify Bank of Baroda at this point because the unauthorised use he became aware of was *not* in relation to the set of procedures agreed with Bank of Baroda.

In any event, even if it could be said that there was 'undue delay' in Mr M notifying Bank of Baroda in the above circumstances – I do not consider that he failed to comply with this obligation with either intent or gross negligence. This is because he was under the impression that the money he held with Bank of Baroda could not be accessed until the end of the agreed fixed term. I appreciate that the terms and conditions of the account state that the bank can release funds before the end of the fixed term at its own discretion. But Mr M could not reasonably have known in what circumstances the bank might exercise such discretion. So he had little reason to suspect that his funds were at risk, notwithstanding any unauthorised use of his payment instrument. But even if it could be said that Mr M ought to have realised (given the terms and conditions), I don't think his failure to notify Bank of Baroda in such circumstances could be said to have fallen so far below the standard of a reasonable person that it could be considered as *grossly* negligent – which is a much higher bar than mere 'negligence'.

I've also thought about whether there are any other reasons why it would be fair and reasonable to hold Mr M liable for the unauthorised transactions, including whether he could have notified the bank any sooner. Mr M only became aware that his payment instrument has been compromised when W Bank contacted him on 1 June 2016. And by that point, the payment instructions had already been sent to Bank of Baroda by the fraudster (with the last such instruction being sent on 31 May 2016 and actioned by the bank on 1 June 2016). So even if Mr M *had* notified Bank of Baroda as soon as he became aware that his payment instrument with W Bank had been compromised, it's very unlikely to have made any difference because the funds had already left his account.

I've further thought about whether any delay in notification could have impacted Bank of Baroda's ability to recover the funds from the receiving bank. But I can see from the statements provided by the receiving banks that the money was quickly removed from these accounts. And I haven't seen any persuasive evidence to suggest that the point at which Mr M notified Bank of Baroda of the fraud ultimately prejudiced their recovery. So I'm not persuaded it would be fair and reasonable to depart from the law in these circumstances in order to hold Mr M liable for the payments.

notification of unauthorised payment transactions

Regulation 59(1) of the PSRs 2009 states that Mr M is entitled to redress only if he notified Bank of Baroda *'without undue delay…on becoming aware of any unauthorised or incorrectly executed payment transaction*'. Mr M only became aware of the unauthorised transactions on his account upon receiving his bank statements, at which point he says he notified Bank of Baroda. So I'm satisfied that he has complied with this relevant obligation and is therefore entitled to redress.

other relevant considerations

Bank of Baroda have also cited the case of *Tidal Energy Ltd v Bank of Scotland PLC* [2014] EWCA Civ 1107 in support of their position that they are not liable for the fraud that took place. In this case, they say the Court of Appeal held that established banking practice did not require that a bank should match names to account numbers and sort codes, therefore the bank was not under a duty of care to do so. As a result, Bank of Baroda say they cannot be held liable for facilitating the defrauding of Mr M's account because they had followed their established banking practice.

Bank of Baroda submit that the relevant questions we should be asking are:

a) Whether the instructions were sent from the customer's registered email with the bank;
b) Whether the instructions were signed by the customer;
c) Whether the bank was obliged to accept the signed instructions received from the customer's registered email address.

They say the answer to all of these questions is 'Yes', which means they cannot be held liable for the transaction in light of the *Tidal Energy* case. However, as I've set out previously, the relevant questions here are those under the PSRs 2009, which I have already addressed above.

I've thought carefully about Bank of Baroda's submissions regarding *Tidal Energy*. However, the case was decided outside the Payment Services Regulations 2009 whose application had been excluded under the relevant terms and conditions. It concerned a CHAPS transfer and the interpretation of the contractual terms contained in the CHAPS transfer form.

Mr M's complaint does not concern a disputed CHAPS transfer. It concerns unauthorised payments made without Mr M's knowledge or consent. The position regarding responsibility for such unauthorised transactions is dealt with in the Payment Services Regulations 2009, as I've explained above. So I do not consider the *Tidal Energy* judgment to have any further relevance to my considerations in this case.

For the reasons set out above, I'm currently minded to conclude it would be fair for Bank of Baroda to provide a full refund to Mr M's account, because he did not authorise the transactions, and I do not think he has failed to comply with his relevant obligations with intent or gross negligence, or has acted fraudulently.

compensation

Having lost a significant amount of money, this was likely a very worrying time for Mr M, and he has been left in an uncertain position since 2016 as to whether he will get his money back. So I also intend asking Bank of Baroda to pay £500 compensation in recognition of the distress and inconvenience this has caused Mr M.

Finally Mr M has said that he did not have any plans to access the money that was stolen from his account until the end of the fixed term period. So I only intend asking Bank of Baroda to pay interest on the amount at the applicable account rate.

As a result, I said I intended directing Bank of Baroda to refund the £109,000 taken from Mr M's account plus interest at the account rate from the date of the withdrawals to the date of settlement – plus £500 compensation.

I invited further comments and evidence from both parties. Mr M responded accepting my proposals. But Bank of Baroda disagreed. In summary, they've said:

- They did everything as per the account mandate and cannot be held liable for the £109,000;
- The ombudsman has failed to ascertain whether Mr M has acted fraudulently or received the money himself, and has also adopted a sympathetic view of the customer when deciding the case;
- It is not possible for them to 'refund' money in this case as the bank is not the receiving party of the funds;
- The ombudsman has not considered regulation 62(3) of the PSRs 2009, and there is no allegation that the bank has acted fraudulently in this case, so the bank can't be held liable according to the regulations;
- An unauthorised third party would not have been able to change the password on Mr M's email account as they would need to answer security questions and also have access to a recovery email address. So Mr M's statement that the fraudster had changed his email address is evidence that he has acted fraudulently, and the bank believes that Mr M did authorise the payments himself;
- The bank also say it is the responsibility of Mr M as the email account holder to make sure his password is secure and safe – and that they cannot be held liable for his negligence in this respect;
- Mr M has also acted negligently by failing to inform the bank of similar suspicious activity reported on his account with W Bank – which he was aware of at least one month before his funds were withdrawn from his account with Bank of Baroda;
- They maintain that the case of *Tidal Energy Ltd v Bank of Scotland PLC* [2014] EWCA Civ 1107 is applicable and it is trite law that a customer's bank cannot be liable for facilitating the defrauding of its customers so long as it follows established banking practice.

my findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Bank of Baroda have made comments about what they perceive to be a biased approach being taken against them by this service, and a sympathetic one being afforded to Mr M. It is the role of the Financial Ombudsman Service – as an independent person – to resolve complaints quickly and with minimum formality, as set out in section 225 of the Financial Services and Markets Act (FSMA) 2000. And as the ombudsman considering this complaint – in line with section 228(2) of FSMA – I have determined what is, in my opinion, fair and reasonable in all the circumstances.
The DISP section of the Financial Conduct Authority's Handbook sets out the rules which apply to the complaint handling procedures. And both Mr M and Bank of Baroda have been given a fair opportunity to make submissions in line with DISP rule 3.5.4R – which I have carefully considered. All findings outlined in my decision have been made on balance, in light of all the evidence and arguments, and have been based on the facts as they have been presented.

Accordingly, I have considered Bank of Baroda's response to my provisional decision. But it does not change my reasoning in deciding that this complaint should be upheld. I'll explain why.

account mandate

Bank of Baroda submit that they have acted in accordance with the account mandate and therefore cannot be held liable for the amount withdrawn. The question of whether the payments were within mandate is governed by Bank of Baroda's terms and conditions, which set out the agreed form and procedure for giving consent referenced in Regulation 55 of the PSRs 2009.

I've already considered what the agreed form and procedure is for making a payment from Mr M's account when I set out Bank of Baroda's terms and conditions in my provisional decision. And as part of this, I considered whether the payment was within mandate and authorised by Mr M. But I said that, on balance, I didn't think Mr M did authorise the payments, and that the evidence suggests the payment instructions were most likely sent by an unauthorised third party. So while I appreciate that Bank of Baroda may have thought the payment was made in accordance with their terms and conditions, in these circumstances that have acted *in breach* of their mandate because the evidence suggests that the payment instructions were forged.

I've taken account of the relevant legal authority in this respect, which supports the position that a bank has no right to debit a customer's account if they've acted on a forged payment instruction. In the case of *Agip (Africa) Ltd. v Jackson and Others* [1989] 3 W.L.R. 1367, which concerned a signed payment order that was subsequently fraudulently altered (to change the payee), Mr Justice Millett set out (at page 283):

> *"The defendants … correctly insist that a bank has no right to debit its customer's account on a forged instruction since in such a case it has no mandate from the customer to do so. The law is conveniently summarised by Robert Goff J. in Barclays Bank Ltd. v. W. J. Simms Son & Cooke (Southern) Ltd. [1980] Q.B. 677 , 699:*
>
> > *"In such cases the bank, if it pays the cheque, pays without a mandate from its customer; and unless the customer is able to and does ratify the payment, the bank cannot debit the customer's account . . ."* [my emphasis added]

I've already set out in my provisional decision why I consider the payment instructions sent to Bank of Baroda were forged and were not sent by Mr M. So even though the bank received a mandate to pay the funds, the *Agip* judgment confirms that where instructions were forged the bank had no right to debit Mr M's account and have therefore breached their mandate.

In such circumstances the payment would be deemed to be *unauthorised* which, as set out in my provisional decision, means that the starting point under the PSRs 2009 is that the bank is liable to refund the money unless it can be shown that the payer has acted fraudulently or failed with intent or gross negligence to comply with their obligations.

allegation of fraud

Bank of Baroda say I have failed to consider regulation 62(3) of the PSRs 2009, and that there is no allegation that the bank has acted fraudulently in this instance, so they cannot be held liable under the regulations. But it appears that Bank of Baroda have misinterpreted regulation 62 as they are not '*the payer'* in this instance, but the *'payment service provider*'. The regulations define a '*payer'* as:

> *"(a) a person who holds a payment account and initiated, or consents to the initiation of, a payment order from that payment account; or*
>
> *(b) where there is no payment account, a person who given a payment order"*

As such, it is Mr M that is the 'payer' as the holder of the payment account. In their submissions, Bank of Baroda have alluded to the possibility of Mr M having acted fraudulently in these circumstances. And since issuing my provisional decision, I have been attempting to establish whether the bank is in fact making an allegation of fraud, and have asked them on several occasions to provide any evidence they have to substantiate such an allegation.

In response, Bank of Baroda have said it would not have been possible for an unauthorised third party to change the password on Mr M's email account as they would need to answer security questions and also have access to a recovery email address. And they believe this to be supportive of their position that Mr M has acted fraudulently and authorised the payments himself.

Bank of Baroda have provided evidence in the form of a screenshot from a Microsoft website that sets out the steps for changing a password, which states that a security code will be sent to an alternative contact in order for the password to be reset. However, this screenshot is dated 19 April 2020. It does not show what the process was for resetting an MSN email password back in May 2016. And in response to Bank of Baroda's claims, Mr M says that at the time the password could be changed just by using the current password – which the fraudster could have obtained through various means – where they could then enter a new one. He said there was no security questions in place at the time. And if the fraudster had changed the password using this process, it would explain why Mr M was not able to access his email account when he became aware of the fraud. So I consider Mr M's submissions to be more persuasive on this point, given that Bank of Baroda have not been able to demonstrate what the security process was at the time.

It may not be possible to get a definitive answer on what the exact process was at the time for changing the password on Mr M's email account. But even if Bank of Baroda were correct about what the process was for changing the password, I don't consider that this would be strong enough evidence to show that Mr M had acted *fraudulently* in any event. There are many ways that a fraudster might be able to surreptitiously gain access to an email account (through '*phishing'* for example). And as I outlined in my provisional decision, the evidence suggests that it was *not* Mr M who sent the payment instructions. For example, W Bank have provided call recordings of the fraudster – who does not appear to be Mr M talking – who was chasing up similar forged payment instructions sent from the same MSN email account used to defraud Bank of Baroda. There is also the fact that the signature provided did not match the specimen held on file, and that a different telephone number was also being used. So I'm still not persuaded that it was Mr M who sent the emails rather than an unauthorised third party. And the bank have not provided any substantive evidence to suggest that the third party was sending the payment instructions with Mr M's knowledge or permission either. So on balance, having considered Bank of Baroda's further submissions as well as the facts and evidence I've just outlined, I do not consider that Mr M acted fraudulently. And Bank of Baroda's arguments have not persuaded me that Mr M has benefited from the funds taken from his account, or that he is now attempting to make a dishonest and fraudulent claim.

gross negligence

Bank of Baroda further submit that they cannot be held liable for Mr M's negligence in failing to keep his email account password secure and safe. So I've also considered whether, pursuant to regulation 62(2)(b), Mr M is liable for the losses he incurred as a result of failing to comply with his obligations under regulation 57 with gross negligence. Regulation 57(1) requires Mr M to:

> *"(a) use the payment instrument in accordance with the terms and conditions governing its issue and use; and*
>
> *(b) notify the payment service provider in the agreed manner and without undue delay on becoming aware of the loss, theft, misappropriation or unauthorised use of the payment instrument."*

Whilst regulation 57(2) provides Mr M "*must on receiving a payment instrument take all reasonable steps to keep its personalised security features safe*". And according to the PSRs 2009, the payment service user can only be held liable for all losses if they have failed to comply with this regulation with intent or gross negligence.

Based on the evidence I have seen, I'm not persuaded that Mr M disclosed his email account password to the fraudster. And, as I set out in my provisional decision, I do not consider Mr M's email account or password to be the "payment instrument" in this case, and there is no provision for banking by email set out in Bank of Baroda's terms and conditions. But given that there is a requirement in the terms and conditions for a signed document containing payment instructions, I considered that it was the *signature* on the signed document that constitutes the 'payment instrument' in this context. Bank of Baroda haven't submitted any arguments or evidence that has changed my reasoning in this regard. And given that I do not think it was Mr M who signed the payment instructions, I do not consider that he has failed to comply with his obligations outlined above with intent or gross negligence.

Bank of Baroda further submit that Mr M has been grossly negligent because he failed to notify the bank of similar suspicious activity reported on his account with W Bank 'one month before' his funds were withdrawn. However, they appear to be confused with the timeline of events here because it wasn't until 1 June 2016 that Mr M was made aware of the attempted fraud on his account with W Bank, by which point the funds had already been withdrawn from his account with Bank of Baroda. And this is similarly another point that I have already dealt with previously in my provisional decision, where I explained that the unauthorised use of Mr M's signature with W Bank forms part of a different set of procedures agreed with a separate bank and so is distinct from those agreed with Bank of Baroda. So it cannot be said that Mr M has failed in his obligation to notify the bank without undue delay because the unauthorised use of his signature that he became aware of was *not* in relation to the agreed set of procedures he has with Bank of Baroda. So the bank's recent submissions in this regard do not change my findings that Mr M did not fail with intent or gross negligence to comply with his obligations under the terms and conditions of his account, or with regulation 57– meaning that Bank of Baroda are still liable for the loss according to the PSRs 2009.

Tidal Energy

Bank of Baroda also maintain that the *Tidal Energy* judgment of the Court of Appeal is applicable to the circumstances of this case, meaning they cannot be held liable for

facilitating the defrauding of their customers if they have followed established banking practice.

The case of *Tidal Energy* concerned a payment instruction made to the bank via a CHAPS transfer form. The claimant had correctly named the beneficiary on the payment instruction but had given an account number and sort code of a different entity. The bank processed the payment through CHAPS on the basis of the payee's account number and sort code, rather than the name of the payee. The bank argued in its defence that this was normal banking practice, such that it could not be held liable for the funds that had since been withdrawn by the unintended recipient.

The question put before the court in the *Tidal Energy* case was how the CHAPS rules operated in circumstances where there was a discrepancy in the instruction between the beneficiary's name and the account information. And the Court of Appeal held that the bank could not be held liable for the misdirected funds in such circumstances. But as I highlighted in my provisional decision, Mr M's complaint does not concern a disputed CHAPS transfer. And another important distinction to be made is that Mr M's complaint concerns a *forged* payment instruction – meaning there were no valid instructions at all – unlike *Tidal Energy* which concerned a *genuine* payment instruction. So I'm still satisfied that the *Tidal Energy* judgment has no further relevance to my considerations given the factual matrix of Mr M's complaint is significantly different to this case, and that the position regarding responsibility for such unauthorised transactions is governed by the PSRs 2009.

So, having reconsidered all the available evidence and arguments – including Bank of Baroda's recent submissions – I still consider it would be fair for Bank of Baroda to provide a full refund to Mr M's account because he did not authorise the transactions, and I do not think he has failed to comply with his relevant obligations with intent or gross negligence, or has acted fraudulently.

Bank of Baroda have said it is not possible for them to 'refund' money in this instance as the bank is not the receiving party of the funds. I ought to clarify that the term 'refund' was used in my provisional decision in the colloquial sense of 'returning' the funds, rather than in accordance with any legal or technical definition. It is also the same terminology used in regulation 61 of the PSRS 2009, which states:

> *"the payment service provider must immediately…**refund** the amount of the unauthorised payment transaction to the payer".*

The term itself isn't specifically defined within the PSRs 2009. But for the avoidance of doubt or any further confusion, it means that Bank of Baroda must *pay* Mr M the amount of the unauthorised payments made from his account.

Finally, I said in my provisional decision that I intended to award Mr M £500 compensation for the distress and inconvenience caused by Bank of Baroda's refusal to return his money. And I'm satisfied this is still a proportionate reflection of the distress and inconvenience suffered, and fair compensation in the circumstances, so I have not made any adjustments to this award.

putting things right

For the reasons given above, I uphold Mr M's complaint as I do not think it was fair and reasonable for Bank of Baroda not to refund the amount taken from his account.

I direct Bank of Baroda to:

- Refund £109,000 to Mr M in full;
- Pay interest on that amount at the account interest rate, from the date of the withdrawals to the date of settlement. If Bank of Baroda deducts tax from the interest element of this award, it should provide Mr M with the appropriate tax deduction certificate;
- Refund any fees or charges Mr M may have incurred on his account that directly resulted from the withdrawal of the disputed payments; and
- Pay Mr M a total of £500 compensation in recognition of the distress and inconvenience caused by Bank of Baroda's handling of the matter.

I've noted that regulation 62 of the PSRs 2009 suggests that Mr M can be held liable up to a maximum of £50 for losses incurred as a result of unauthorised payment transactions. And given that this is also provided for in Bank of Baroda's terms and conditions, they are entitled to deduct this amount from the redress I have proposed above.

my final decision

For the reasons given above, I uphold this complaint and direct Bank of Baroda to calculate and pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 28 June 2020.

Jack Ferris
ombudsman