

complaint

Mr T has complained that CROSSBARfx Limited has not refunded him the costs of two transactions, totalling \$140,000, which he did not authorise in August 2013.

background

Mr T used CROSSBARfx services to transfer funds to purchase property overseas. He also knew a director of CROSSBARfx who he kept up-to-date with his financial plans, occasionally meeting him socially. Mr T transferred funds to his CROSSBARfx account in August 2013 as he planned to buy some property.

Two transactions were made from this account on 12 and 15 August: each being \$70,000 or the equivalent. These funds went to different beneficiaries and instructions to CROSSBARfx were made using email. Mr T disputed that he had authorised these. CROSSBARfx discussed with Mr T how the money could be recovered but this did not prove possible. Mr T asked CROSSBARfx to refund him the money. They refused saying that they were under no obligation as Mr T had agreed to indemnify CROSSBARfx for any losses if they carried out instructions that he did not authorise.

Mr T brought his complaint to the ombudsman service. Our adjudicator recommended that his complaint was upheld and that Mr T should be repaid \$140,000 plus 8% interest from the date of the transactions. He felt that there was no doubt that Mr T had not authorised these transactions. CROSSBARfx did not agree with his recommendation and asked for an ombudsman to review the case. At that stage Mr T told us of his additional expenses: AED 68,072.40 which he paid in December 2013 as the additional 2% property registration fee; and £1,500 costs for taking out a private loan to fund the property purchase.

I issued a provisional decision in November 2014 upholding Mr T's complaint. I broadly agreed with the adjudicator's view that Mr T had not authorised these transactions and that it was not fair for CROSSBARfx to hold him liable. I did not believe, however, that CROSSBARfx should refund Mr T's additional expenses as I did not consider that to be fair.

In response, Mr T:

- clarified that he had only really used CROSSBARfx for one property purchase previously, albeit this was made in instalments;
- felt strongly that CROSSBARfx's status as a smaller payment institution should not impact their liability; and
- believed that his losses were a direct consequence of CROSSBARfx's actions.

Whereas CROSSBARfx:

- disputed the facts of Mr T's conversation with a director of CROSSBARfx in August 2013 and were concerned that I had based my decision on that disputed fact;
- were concerned that customers understand that transfer instructions would not be made where verbal instructions suggested that CROSSBARfx should not expect email instructions;
- believed that the redress was not fair and reasonable and that if the case continued to be upheld I should consider recommending payment in instalments.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulator's rules, guidance and standards, and codes of practice. Where appropriate I will also consider good industry practice at the time.

As I stated in the provisional decision our adjudicator considered the case in the light of the Payment Services Regulations. Although not all aspects of these two disputed transactions are covered by this legislation, I remain satisfied this provides a framework for how we consider these types of complaints. I am aware that the two transfers were made in a non-EU currency and were received by beneficiaries outside of the EU. However there is no dispute that CROSSBARfx is an authorised payment institution and were providing payment services to Mr T.

But I would add that the Payments Services Regulations were not all I considered whilst reviewing this case. Whilst we take account of the law and the contractual terms, the ombudsman service tenets of being fair and reasonable are also key to my consideration.

I believe there are two aspects of this case which have influenced my decision and these are:

did Mr T authorise these two transactions?

CROSSBARfx disagreed very strongly with our adjudicator's view that both parties accepted that Mr T did not authorise the two disputed transactions. Not only do they consider that Mr T did not provide any evidence to them, as requested, they believed that the emails were in line with his verbal instructions.

I see no need to repeat the contents of my provisional decision as both parties are aware of what was written there. CROSSBARfx took me to task for certain words I used previously. I should clarify that I appreciate that there is a dispute over the facts and have carefully considered everything that both parties submitted to our service. But I remain of the view that Mr T did not authorise these two payments and was a victim of a sophisticated fraud. It's worth saying however that it is not on this aspect alone that I have made my decision to uphold Mr T's complaint.

It's worth mentioning that I am satisfied that there is no explicit requirement on Mr T to prove that he did not authorise these transactions. In fact it is generally accepted that any burden of proof lies with the business.

For the avoidance of doubt, I do not doubt CROSSBARfx's statement that they would never knowingly act upon emailed instructions that were inconsistent with a customer's verbal instructions.

is it fair to hold CROSSBARfx liable for these unauthorised transactions?

I know that CROSSBARfx considers that that they are not contractually obliged to refund Mr T. I have reviewed their terms and conditions, paying close attention to three clauses:

clause 15.2 “the Customer hereby agrees to indemnify Crossbarfx as a result of (b) Crossbarfx effecting and taking all and any action and steps whatsoever to carry out the terms of any instruction from or purporting to be from a person duly designated or authorised by the Customer;”

clause 15.3 “in consideration of and Crossbarfx agreeing so to do the Customer hereby undertakes to indemnify Crossbarfx and keep it fully indemnified at all times against all damages, losses, claims, proceedings, demands, liabilities, costs and expenses which Crossbarfx may incur or suffer through Crossbarfx either acting or failing to act upon any such instruction communicated in one of the manners specified [above]”

clause 15.3 c) “The Customer acknowledges it is not practical or necessary for Crossbarfx to establish the authenticity of all messages telefaxed, telephoned and/or e-mailed to it which purport to emanate from the Customer”

They believe that this means that they cannot be liable for Mr T's losses. Whilst I accept that Mr T signed these terms and conditions, I am not satisfied that CROSSBARfx can contract out of all liability, which is essentially what these clauses suggest. I believe that in taking a decision not to establish the “*authenticity of all messages*”, CROSSBARfx was doing that at their own risk.

There is a general requirement that onerous or unusual terms – such as passing all liability to one of the contracting parties – must be brought to the attention of the relevant party. In this case I would expect steps to have been taken by CROSSBARfx in highlighting these clauses to Mr T when he was providing them with authorisation. I have seen nothing to indicate this occurred and therefore, I am satisfied that I can read these clauses in Mr T's favour.

As I don't believe that Mr T authorised the transactions and CROSSBARfx's terms and conditions don't protect them from liability, I consider the fair redress is that CROSSBARfx reimburse Mr T \$140,000 plus 8% simple interest from the date of the transactions. CROSSBARfx knows that the interest rate applied to the redress is not something that I have any discretion over.

I do sympathise with the burden this places on CROSSBARfx who are a smaller payment institution. I accept that they believed they were following Mr T's instructions so I understand why they will consider this outcome unfair. However as I said in the provisional decision, they are authorised and understand the scope of their potential liabilities. Because of the burden this will place on them, CROSSBARfx asked me to consider whether it was fair that they pay Mr T in instalments. However as Mr T is the customer in this complaint, I cannot instruct him to accept this. That said, it remains open to CROSSBARfx to negotiate with Mr T about how they make any redress payment.

The only issue left to finalise is Mr T's claim for consequential losses. I know he will be disappointed but I have not changed my mind on this aspect. I do not consider it fair that CROSSBARfx reimburse him for the additional property registration fees or the cost of securing alternative funding. As my thinking was outlined in the provisional decision, and this has not changed, I have not repeated it here.

my final decision

For the reasons set out above, my final decision is to uphold Mr T's complaint and I instruct CROSSBARfx Limited to:

- Refund \$140,000 to Mr T for the two unauthorised transactions; and
- Pay 8% simple interest on this amount from the date of the original transactions to the date of settlement.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr T to accept or reject my decision before 13 February 2015.

Sandra Quinn
ombudsman