

## complaint

Mrs T has complained Clydesdale Bank PLC won't refund £10,000 which she didn't authorise. She believes they should have done more to protect her.

## background

After the death of her husband, Mrs T arranged for her daughter, Miss T, to be given a debit card on her current account with Clydesdale as a third party. This was in November 2015. Clydesdale explained Mrs T "*authorised the issue of a debit card to her daughter so she could undertake day to day transactions*". It's also clear that a third-party mandate on a Clydesdale account authorises the use of a card by that person – in this case Mrs T's daughter. It also requires the bank to honour those transactions.

As Mrs T's health declined, her son got a Power of Attorney set up for his mother. He became concerned at some of the activity on his mother's account. Specifically, some larger-scale withdrawals so he asked his mother about these. This included a withdrawal on 24 November 2015 for £1,000 which Mrs T confirmed she'd made and signed for. She didn't know about the transaction on 18 December 2015 when £10,000 was withdrawn in cash in a branch. This was done by Miss T using her own card.

Clydesdale said there was nothing wrong with this transaction. They'd been required to honour the withdrawal as it was made by Miss T in line with the third-party mandate. Mr C, Mrs T's son who holds the Power of Attorney, was unhappy with this. He didn't believe Clydesdale had done enough to check the transaction. It'd only been verified by chip and PIN with Clydesdale doing no other checks. As Clydesdale would do nothing further, he brought his mother's complaint to the ombudsman service.

Our investigator reviewed the evidence. This included the fact that there was no copy of the actual mandate held by Mrs T's daughter. Overall and taking all circumstances into account, he didn't believe Clydesdale had done enough when considering Mrs T's complaint. He asked them to refund £10,000 along with 8% simple interest per year.

Clydesdale strenuously defended what had happened. They felt Mrs T had authorised the withdrawal and they had no choice but to honour Miss T's withdrawal. They asked an ombudsman to review the complaint.

I completed a provisional decision on 15 January 2020. I also upheld the complaint but I expanded on the reasoning slightly.

Mr C welcomed the decision but had a few points to re-emphasise:

- His mother was in a vulnerable situation after her husband died and had moved into her daughter's house as she was largely housebound. This explained why she'd felt it necessary to get a debit card for her.
- Mrs T would never have thought it possible to withdraw £10,000 in cash just using a debit card so would never have thought of needing to protect herself from this. For example, she knew when she withdrew £1,000 in cash that she had to sign for this transaction.
- He felt Clydesdale had failed in their duty to Mrs T by not explaining that the third party mandate had given unlimited access to her account to her daughter.

Clydesdale queried the payment made into Mrs T's account at the same time as her daughter withdrew £10,000. They thought mentioning this may remind Mrs T she gave authority to her daughter to withdraw £10,000. They made no further comments on the outcome of the complaint.

I now have all I need to complete my final decision.

### **my findings**

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 and received limited comment from either party, I'm coming to the same conclusion as in my provisional decision. There's little need to amend what I previously wrote.

The Payment Services Regulations primarily require banks to refund customers if they didn't make or authorise payments themselves. Certain other circumstances do apply – but nothing specific that's had an impact on the decision I'm making here. So, when we look at whether a bank has acted fairly in rejecting someone's fraud complaint, one of the things we consider is whether the customer made the transactions themselves or allowed them to be made. If they did, then we generally wouldn't ask the bank to refund them unless there are other reasons to do so.

So, we go on to consider other factors as I've done here. This would include whether this transaction was unusual. And whether because of this we'd expect a bank to ask further questions as this was being undertaken.

To help me decide what happened, I've looked at the transaction itself, as well as what evidence Clydesdale and Mr C have given us.

Firstly, it's worth saying there's no dispute Mrs T asked Clydesdale to give her daughter a debit card for her account. She signed a third-party mandate to this effect. Clydesdale no longer hold a copy of this mandate. But this fact hasn't really played a major part in the decision I'm making. Clydesdale have told us about the format of their third-party mandates at the time and what they believed they were required to do to meet them.

As Mrs T authorised her daughter to be given a debit card, she was also allowing her to use this card to carry out transactions. Clydesdale believe they had no choice but to act on Miss T's instruction (I'll tackle this aspect further in my decision). She used the card she held for Mrs T's account to withdraw £10,000. They asked her to verify this transaction by the use of the genuine card and her PIN. Miss T did this. This was their process at the time to verify transactions of this value. Again, these facts are not in dispute. This is essentially the gist of Clydesdale's argument. They were acting on the authority Mrs T had given to her daughter to undertake "*day to day transactions*".

Clydesdale state they often would ask for photographic ID when handling transactions of this amount. I can't tell for sure – as records no longer exist – whether they did this here. But I can't see what difference this would have made. Nobody really disputes that Miss T carried out this withdrawal.

So, I've gone on to consider whether this transaction was authorised. The terms of the third-party mandate are not specific about whether there are any transactions – because of their value, for example – that Clydesdale would not allow a third party to carry out. In the

absence of this information, I suspect the answer to this is not really. So, because Miss T held a third party mandate – which Mrs T had authorised – the transaction regardless of its value and because it was carried out by the card was authorised in Clydesdale's view.

I've reviewed our approach on issues of apparent authority. For example even if Mrs T gave her authority to Miss T to carry out card transactions, I accept it's possible for Miss T to then abuse her trust and exceed her actual authority by using the card and PIN that she'd been given to make further payments that Mrs T didn't agree to or know about. If that's what happened – and based on the evidence this seems likely – I think the act of Mrs T in providing her daughter with the card and PIN served to, in effect, authorise the withdrawal of £10,000. This is even the case when Mrs T may not have known about the withdrawal at all.

I have gone on to consider what else Clydesdale could have done at the time of the withdrawal.

In doing this I have considered that Miss T had only been set up as a third-party mandate-holder for less than a month when she withdrew £10,000. There was also no history of Mrs T making such large withdrawals as far as I'm aware. I appreciate this was shortly after Mrs T's husband had died so the use on the account may not have yet settled into a normal pattern. But Clydesdale knew about Mrs T's personal circumstances so this further makes me think they should have done more when Miss T withdrew £10,000.

Clydesdale's argument is they were obliged to allow Miss T's transaction under the third-party mandate. But I don't agree.

Banks have and do exercise a duty of care on their customers' behalf. This is often referred to as a *Quincecare duty*. This comes from a legal decision in 1992. As a recent legal discussion put it:

*"It implies into the contract between a bank and its customer an obligation that the bank owes a duty of care not to carry out the customer's order if it knows the order to be dishonestly given, or shuts its eyes to obvious dishonesty, or acts recklessly in failing to make inquiries"*

A recent Supreme Court decision has made it clear that the Quincecare duty is effectively a duty to protect customers from themselves: *"the purpose of the Quincecare duty is to protect a bank's customers from the harm caused by people for whom the customer is, one way or another, responsible"*. The Court confirmed that the duty is an important bulwark against financial crime.

From early 2015 there has been an increased attention paid by regulators and industry groups on protecting vulnerable customers. This has resulted in best practice and initiatives like the Banking Protocol. Most of these were in place too late to impact what happened here but it's difficult to ignore the increased focus being placed on these initiatives which had started before the time of Miss T's withdrawal.

Clydesdale has no branch notes from this transaction but in all likelihood, I think nothing was said or asked of Miss T when she completed this withdrawal. They've certainly not suggested otherwise.

I believe Clydesdale could have exercised caution here. They then could have checked with Mrs T about the withdrawal. There's no indication that Mrs T was unable to make decisions.

It's clear that it was her discussion with her son months later which alerted him to the fact she hadn't known about this withdrawal.

I don't get the idea Miss T was a hardened criminal and may just have been chancing her arm. Further questioning either by Clydesdale or her mother I think would have led to this transaction not taking place.

The key point for me is that this was a substantial withdrawal – out of character – on a new third-party mandate. I'd have expected this to ring alarm bells for Clydesdale too. We're not talking about a day to day transaction – we're looking at a one-off withdrawal in cash of £10,000 which would be classified as unusual even if the account holder herself had been withdrawing that money. I'd have expected questions to have been asked and there's no evidence this happened.

Overall, I think Clydesdale in failing to exercise its duty of care properly let down Mrs T.

Clydesdale has mentioned at the same time as the daughter withdrew £10,000, she also deposited a cheque on her mother's behalf. I was aware of this. Mr C told us this cheque was an insurance policy paid out following Mrs T's husband's death. I'm not sure what point Clydesdale is trying to make here – that because Mrs T knew about the cheque being paid in, she'd have known about her daughter taking out £10,000? To clear this up, I'm sure Mrs T knew the cheque was being paid in but I don't think this signifies she knew about the withdrawal. As I confirmed above, she wasn't aware about this until many months later.

I believe the right way to resolve this is for Clydesdale to refund £10,000 to Mrs T. They'll need to add 8% simple interest per year from 18 December 2015 until the date of settlement.

### **my final decision**

For the reasons I've given, my final decision is to instruct Clydesdale Bank PLC to:

- Refund £10,000 to Mrs T; and
- Add 8% simple interest to that amount from 18 December 2015 to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs T to accept or reject my decision before 4 March 2020.

Sandra Quinn  
ombudsman